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In the Supreme Court of the United States

OCTOBER TERM, 1977

CECIL D. ANDRUS, SECRETARY OF THE INTERIOR, PETITIONER

v.

CHARLESTONE STONE PRODUCTS CO., INC.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

WADE H. MCCREE, JR.,
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v.

CHARLESTONE STONE PRODUCTS CO., INC.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The Solicitor General, on behalf of the Secretary of the Interior, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The opinion of the court of appeals (App. A, *infra*, pp. 1a-17a) is reported at 553 F. 2d 1209. The district court's opinion (App. C, *infra*, pp. 19a-27a) is not reported. The decision of the Interior Board of

Land Appeals (IBLA) (App. D, *infra*, pp. 28a-58a) is reported at 9 IBLA 94.

JURISDICTION

The judgment of the Court of Appeals (App. B, *infra*, p. 18a) was entered on May 12, 1977. By order of August 1, 1977, Mr. Justice Rehnquist extended the time within which to file a petition to and including September 9, 1977. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether water is a locatable mineral under the mining law of 1872.

STATUTES INVOLVED

Section 9 of the Act of July 26, 1866, 14 Stat. 253, as amended, 30 U.S.C. 51, provides:

> Whenever, by priority of possession, rights to the use of water for mining, agricultural, manufacturing, or other purposes have vested and accrued, and the same are recognized and acknowledged by the local customs, laws, and the decisions of courts, the possessors and owners of such vested rights shall be maintained and protected in the same; * * *.

Section 17 of the Act of July 9, 1870, 16 Stat. 218, as amended, 30 U.S.C. 52, provides:

> All patents granted, or homesteads allowed, shall be subject to any vested and accrued water rights, or rights to ditches and reservoirs used in connection with such water rights, as may have been acquired under or recognized by section 51 of this title.

Section 1 of the Act of May 10, 1872, 17 Stat. 91, as amended, 30 U.S.C. 22, provides:

> Except as otherwise provided, all valuable mineral deposits in lands belonging to the United States, both surveyed and unsurveyed, shall be free and open to exploration and purchase, and the lands in which they are found to occupation and purchase, by citizens of the United States and those who have declared their intention to become such, under regulations prescribed by law, and according to the local customs or rules of miners in the several mining-districts, so far as the same are applicable and not inconsistent with the laws of the United States.

STATEMENT

Since 1872 the federal mining laws have permitted citizens to explore, discover and extract valuable minerals from the public domain and to secure fee title to lands containing such discoveries. Act of May 10, 1872, 17 Stat. 91, as amended, 30 U.S.C. 22 *et seq; Cameron* v. *United States*, 252 U.S. 450, 460. The claimant must establish that he has discovered a valuable mineral deposit within the limits of each claim. *Cole* v. *Ralph*, 252 U.S. 286, 295. The test for value is the "prudent man test," *Chrisman* v. *Miller*, 197 U.S. 313, 322, augmented by the marketability test, *United States* v. *Coleman*, 390 U.S. 599, 602-603. The combined tests require evidence of a mineral deposit of

such character that a person of ordinary prudence would be justified in the further expenditure of time and money with a reasonable expectation that the minerals from the claims could be marketed at a profit. In 1955 Congress withdrew "common variety" minerals such as sand and gravel from location under the mining laws. Act of July 23, 1955, Section 3, 69 Stat. 368, as amended, 30 U.S.C. 611. Consequently a claimant to a deposit of such minerals must show that there was a valuable discovery prior to the 1955 withdrawal date, *Cameron* v. *United States*, 252 U.S. 450, 462, as well as at the time of the administrative hearing. *Best* v. *Humboldt Placer Mining Co.*, 371 U.S. 334, 336.

The Secretary of the Interior initiated this action in 1965, contending that each of 25 sand and gravel placer mining claims near Las Vegas, Nevada, held by Charlestone Stone Products Co., Inc.,[1] was invalid for want of a timely discovery of a valuable mineral prior to July 23, 1955, the date common variety minerals became no longer locatable.[2] Following a

[1] The claims were the Charlestone, Charlestone Nos. 1-22, and Nos. 12A and 13A (App. D, *infra*, p. 33a). The courts below apparently omitted the Charlestone from their discussion inadvertently, as they refer to only 24 claims, but we assume that the decisions below apply to the Charlestone as well. (Although the name on the claims is actually "Charleston," and both the claims and respondent were so denominated in the administrative record (see App. D, *infra*, p. 33a), in the courts below respondent has used the name "Charlestone," and those courts have applied this spelling to the claims as well as to respondent. We do the same to minimize confusion.)

[2] Act of July 23, 1955, Section 3, 69 Stat. 368, as amended, 30 U.S.C. 611.

full hearing, an administrative law judge found that the sand and gravel in question were common variety minerals and that Charlestone had established the discovery of a valuable mineral by the critical date only as to claim 10[3] (see App. D, *infra*, p. 32a). The Interior Board of Land Appeals affirmed (App. D, *infra*, p. 58a).

The United States District Court for the District of Nevada reversed, holding that (1) the testimony of the Secretary's only witness, an expert mining engineer, should not have been credited by the agency on the issue of marketability, since he was not personally conversant in 1955 with the local market for sand and gravel from the claims, and (2) the successful drilling of a water well on claim 22 in 1962 and the leasing of claims 1-16 in 1964 at a minimum annual royalty of $12,000 were substantial evidence that material could have been extracted from these claims at a profit prior to July 23, 1955 (App. C, *infra*, pp. 20a-21a, 24a). Accordingly, "at least"

[3] The administrative law judge also held claim 9 valid as a reasonable reserve for claim 10, but the IBLA reversed because there was no independent evidence of marketability regarding claim 9 (App. D, *infra*, pp. 52a-53a).

The administrative law judge found that claims 12A and 13A, which were located after the effective date of the Act of July 23, 1955, were void *ab initio* (App. D, *infra*, pp. 33a, 49a). These findings were affirmed by the Interior Board of Land Appeals and by the district court (App. D, *infra*, p. 49a; App. C, *infra*, p. 25a). Charlestone acknowledged in the court of appeals that the materials on its claims were common varieties and that claims 12A and 13A were therefore invalid (App. A, *infra*, p. 2a n. 1).

claims 1-16 were valid, and access to the water Charlestone had discovered on claim 22 should be permitted (App. C, *infra*, p. 26a).[4]

The court of appeals affirmed with one significant addition: it held that claim 22 was also valid, because Charlestone's well was evidence of its discovery of water, which the court concluded was a locatable mineral. The parties had neither briefed nor argued this question. The court stated that "[s]ince early times, water has been regarded as a mineral," and observed that the federal mining statutes which allow the location of placer claims "do not expressly define water as a non-mineral" (App. A, *infra*, pp. 15a-16a). Because "the successful recovery of many 'hard' minerals from the earth and the utilization of the soft mineral of water therewith go hand in hand," the court declined to assume "that Congress was not aware of the necessary glove of water for the hand of mining * * * [or that] Congress impliedly intended to reserve water from those minerals allowed to be located and recovered" (App. A, *infra*, p. 16a). The court noted that water was not named as one of the common varieties of minerals that were withdrawn from location as of July 23, 1955, so "it is of no importance that the discovery of water within Claim 22 occurred after" that date (App. A, *infra*, pp. 16a-17a). The water on claim 22

[4] The district court offered no legal basis for authorizing access to the water on claim 22, and we are aware of none under federal law. We have no way of knowing whether Charlestone might be able to establish the right to use that water under state law. See pp. 8-10, *infra*.

"undeniably has an intrinsic value in the desert area," although there was "no evidence of a profitable market of the water per se for either domestic or irrigation uses" (App. A, *infra*, p. 17a). Since the water could be used to wash the sand and gravel from Charlestone's other claims, and there was a profitable market for washed sand and gravel, the court held that "Charlestone has shown a profitable market for the water recovered upon Claim 22 and its claim for the extraction of that water is valid" (App. A, *infra*, p. 17a).

REASONS FOR GRANTING THE WRIT

The decision of the court of appeals announces the startling conclusion that water is a mineral for which claims to public lands may be located and perfected under the federal mining laws. This pronouncement disregards all the precedents of this Court and the administrative tribunals. It is also contrary to the applicable statutes, in which Congress has made clear its intention that acquisition of water rights on public lands is to be governed by state and local laws, not by the federal mining laws.[5]

[5] The decision below is erroneous in another respect. This is one of a series of mining cases in which the Ninth Circuit Court of Appeals, and district courts under its authority, have been upholding mining claims by reweighing the evidence and substituting their judgment for that of the administrative tribunals of the Department of the Interior. See *Verrue* v. *United States*, 457 F.2d 1202 (C.A. 9); *Osborne* v. *Morton*, C.A. 9, No. 72-2290, decided February 22, 1974 (unreported), remanding to the district court "to review the administrative record and reassess the factual conclusion of the Secretary of

In 1866, in the first mining law that opened "mineral lands" owned by the federal government for exploration and occupation, Congress declared that

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the Interior concerning the value of the mineral deposit in the light of *Verrue* v. *United States* * * *"). Thus, the court of appeals here rejected the testimony of the government's sole witness, Fisher, a mining engineer (App. A, *infra*, p. 7a), in part on the ground, following *Verrue*, that his opinion was "unfounded" because he did not have "personal knowledge of the sand and gravel market" in the relevant locality at the crucial date of July 1955 (App. A, *infra*, p. 11a). The court also declared Fisher's testimony to be "flatly contradicted" by other evidence (App. A, *infra*, p. 11a), an appraisal quite different from the judgment the Interior Board of Land Appeals reached (App. D, *infra*, pp. 41a-46a, 53a-58a). Further, while acknowledging that it was the claimant's burden to establish "[a] discovery of a valuable deposit of sand and gravel on each of its claims" (App. A, *infra*, p. 3a), the court of appeals, like the district court, did not examine the evidence to determine the development of each particular claim, but lumped it together and considered it applicable to all the claims—an approach whereby, as the IBLA noted (App. D, *infra*, p. 40a), "a person could locate an entire desert and establish its marketability by selling sand and gravel from a single location." See, *e.g.*, *Best* v. *Humboldt Placer Mining Co.*, 371 U.S. 334, 336. In particular, the court of appeals failed to note that as to eight or nine of the Charlestone claims, there was no evidence that any sand or gravel had ever been removed (App. D, *infra*, p. 53a).

The Ninth Circuit's standard of judicial review of mining claim decisions, as exemplified in this case, threatens to hamstring the Secretary of the Interior in the discharge of his responsibility to see that only valid mining claims are recognized and that the rights of the public in the public lands are preserved. See *Cameron* v. *United States*, 252 U.S. 450, 459-460. While we do not regard the error in this case as significant enough to warrant seeking review on this ground, we have noted it because, if the trend of decisions it illustrates continues, we may ask the Court to review the issue in another case.

rights which were acquired "by priority of possession" to the use of water on those lands, and which were "recognized and acknowledged by the local customs, laws, and the decisions of courts," were to be "maintained and protected." Section 9 of the Act of July 26, 1866, 14 Stat. 253, as amended, 30 U.S.C. 51. And Section 17 of the Act of July 9, 1870, 16 Stat. 218, as amended, 30 U.S.C. 52, provided that all patents and homesteads on public lands "shall be subject to any vested and accrued water rights" acquired or recognized under the 1866 law. The Act of May 10, 1872, 17 Stat. 91, as amended, 30 U.S.C. 22 *et seq.*, which remains the basic law relating to mineral claims, superseded portions of the earlier acts but left these water rights provisions unchanged. As this Court concluded in *California Oregon Power Co.* v. *Beaver Portland Cement Co.*, 295 U.S. 142, 155:

> The effect of these acts is not limited to rights acquired before 1866. They reach into the future as well, and approve and confirm the policy of appropriation for a beneficial use, as recognized by local rules and customs, and the legislation and judicial decisions of the arid-land states, as the test and measure of private rights in and to the non-navigable waters on the public domain.

The Court in that case also considered the effect of Section 1 of the Desert Land Act of 1877, 19 Stat. 377, as amended, 43 U.S.C. 321, and stated (295 U.S. at 162):

> The fair construction of the provision now under review is that Congress intended to establish the

rule that for the future the land should be patented separately; and that all non-navigable waters thereon should be reserved for the use of the public under the laws of the states and territories named. The words that the water of all sources of water supply upon the public lands and not navigable "shall remain and be held free for the appropriation and use of the public" are not susceptible of any other construction. The only exception made is that in favor of *existing* rights; and the only rule spoken of is that of *appropriation*. It is hard to see how a more definite intention to sever the land and water could be evinced. The terms of the statute, thus construed, must be read into every patent thereafter issued, with the same force as though expressly incorporated therein, with the result that the grantee will take the legal title to the land conveyed, and such title, and only such title, to the flowing waters thereon as shall be fixed or acknowledged by the customs, laws, and judicial decisions of the state of their location [emphasis in original].[6]

The court of appeals did not consider any of these statutory provisions. It merely observed that the min-

[6] Section 4 of the Act of July 23, 1955, 69 Stat. 368, as amended, 30 U.S.C. 612, also seems to reflect the congressional understanding that water is not a mineral under the mining laws. Section 4 provides that nothing in that Act, which removed common variety minerals from location under 30 U.S.C. 22 and 35,

> shall be construed as affecting or intended to affect or in any way interfere with or modify the laws * * * [of the western states] relating to the ownership, control, appropriation, use, and distribution of ground or surface waters within any unpatented mining claim.

ing laws did not expressly define water as a nonmineral (App. A, *infra*, p. 16a).

The administrative decisions of the Department of the Interior have consistently held that water is not a locatable mineral[7] and that the acquisition of water rights is not governed by the federal mining laws. E.g., *Robert L. Beery*, 25 IBLA 287; *Charles Lennig*, 5 L.D. 190; *William A. Chessman*, 2 L.D. 774; *Pagosa Springs*, 1 L.D. 573. After a full review of the prior decisions, the Interior Board of Land Appeals last year concluded in *Robert L. Beery*, which is reprinted as Appendix E, that water could not now be classified as a locatable mineral "[i]f we are to pay more than lip service to the doctrine of stare decisis * * *" (App. E, *infra*, p. 63a).

The court of appeals failed to note these administrative authorities. This Court, however, has said that "great deference" is due to a statutory interpretation adopted by the officers charged with administering the land laws. *Udall* v. *Tallman*, 380

[7] This is so although water may be defined as a mineral for some other purposes. As the IBLA observed in *Robert L. Beery*, 25 IBLA 287 (App. E, *infra*, p. 66a), "[i]f all those substances which are quite literally 'minerals,' such as common dirt, were locatable under the mining law, there could have been no entry under the homestead or other agricultural entry laws, nor any land grants to states and railroads, as all land would then have been 'mineral land.'" As this Court recognized in *Northern Pacific Railway Co.* v. *Soderberg*, 188 U.S. 526, 530, the broadest definition of the word mineral, as in the division of matter into animal, vegetable, and mineral, would be "absurd as applied to a grant of lands, since all lands belong to the mineral kingdom * * *."

U.S. 1, 16; *Best* v. *Humboldt Placer Mining Co.*, 371 U.S. 334, 335-336.

The novel holding below, if allowed to stand, will unsettle the law of water rights throughout the western states, drawing into question the validity of private rights long thought to be established. The relevant provisions of federal law, 30 U.S.C. 51 and 52, on their face give effect to water rights recognized and acknowledged under local law. The owner of water rights established by prior appropriation under local law normally enjoys the beneficial use of the water that passes through or under his land. See 5 Clark, *Waters and Water Rights*, §§ 408.1, 423-424, 443 (1972). But if water is a locatable mineral, it is presumably possible to perfect a mining claim to the same water before it reaches the land of the present user, or, in the case of an underground basin, before the water is used by whoever presently has the right to such use.[8] Since the owner of a mining claim takes title to the mineral, his claim to the water might be superior to any preexisting right to the use of the same water under state law.

To construe 30 U.S.C. 22 as permitting the location of a mineral claim to water thus seems to put that statute in conflict with 30 U.S.C. 51 and 52. Section 51 states that water rights gained by prior appropriation and acknowledged under state law are

[8] While the water on claim 22 was ground water, the court's reasoning would appear to apply to water generally, including surface water. This is, however, one of the questions raised and left open by the decision below.

to be "maintained and protected." Section 52 provides that the grantee of a federal patent takes subject to preexisting water rights established under state law—a provision difficult to apply, it would seem, to a federal patent itself based on a claim to water as a valuable mineral.

The innovation by the court of appeals thus is likely to spawn extensive litigation between rival claimants to water rights, under the federal mining laws on the one hand and state doctrines of prior appropriation on the other.

Moreover, allowing mining claims to a substance as common and accessible as water—but not one of the "common variety" minerals withdrawn from location by the Act of July 23, 1955—would permit private acquisitions from the public lands without the commensurate public gain that results from the exploitation of substances traditionally classed as valuable minerals under the mining laws. And since mining claims, like those in this case, need not specify the mineral discovered, invalid claims originally premised on the discovery of some other mineral could be validated by a showing that water is present (as the court of appeals did with claim 22 in this case.)[9] Indeed, since the court here relied on the

[9] The court did not discuss whether water is to be located as a lode or placer claim. Although this case involved a placer claim, an argument can be made that water would fall more logically within the definition of a lode claim. See *United States* v. *Iron Silver Mining Co.*, 128 U.S. 673; *Fuller* v. *Mountain Sculpture, Inc.*, 6 Utah 2d 385, 314 P.2d 842. In the case of a lode claim, the claimant normally has the right to

intrinsic value of water in a desert region to show marketability, it may be that any claimant who can show the presence of water may appropriate public lands in the arid western states. Such a result would be contrary to the intention of Congress as expressed in the Desert Land Act of 1877 and in the other legislation we have noted.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted.

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SEPTEMBER 1977.

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follow the vein or the lode outside of his claim. 30 U.S.C. 26. Thus it might be possible by a single lode claim for a claimant to gain ownership of all the ground water in a basin or of an entire stream.

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 75-1532

[Filed May 12, 1977]

CHARLESTONE STONE PRODUCTS CO., INC.,
a corporation, PLAINTIFF-APPELLEE

v.

CECIL D. ANDRUS, Secretary of the Interior,*
UNITED STATES OF AMERICA,
DEFENDANTS-APPELLANTS

Appeal from the United States District Court
For the District of Nevada

Before: TRASK and GOODWIN, Circuit Judges,
and EAST,** District Judge

EAST, Senior District Judge:

The Cause:

Cecil D. Andrus, for the defendants-appellants, as Secretary of Interior, (Secretary) appeals the judgment of the District Court holding valid and granting

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* Rogers C. B. Morton, as Secretary of Interior, was the originally named Secretary. We note the name of his present successor in office.

** Honorable William G. East, Senior United States District Judge for the District of Oregon, sitting by designation.

access to certain placer sand and gravel mining claims located in the Las Vegas Valley in Nevada. We affirm.

The Secretary of November 17, 1965 initiated a contest complaint against the plaintiff-appellee Charlestone Stone Products Co., Inc. (Charlestone), attacking the validity of Charlestone's placer mining locations for sand and gravel numbered 1 through 22 and numbered 12A and 13A.[1] The Administrative Law Judge found Claims 9 and 10 to be valid. On cross-appeals, however, the Secretary's Board of Land Appeals (Board) found only Claim 10 to be valid. Upon judicial review, the District Court, believing an injustice had been accomplished, held that "at least the claims 1 through 16" were valid. It also held that Charlestone should be granted access to Claim 22 in order to utilize, in the operations of the valid claims, the water produced from a well driven on Claim 22.

Issues on Review:

While the Secretary asserts the issues on review in different terms, we deem the pertinent issues to be:

(1) Whether, upon construing the record as a whole, the Secretary's finding that only Claim 10 was valid is supported by substantial evidence. *Multiple Use, Inc.* v. *Morton*, 504 F.2d 448, 452 (9th Cir. 1974); *White* v. *Udall*, 404 F.2d 334, 335 (9th Cir.

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[1] Claims numbered 12A and 13A located after the year 1955 are not in issue.

1968); and *Henrikson* v. *Udall*, 350 F.2d 949, 950 (9th Cir. 1965), *cert. denied*, 384 U.S. 940 (1966).

(2) Whether Charlestone met the two prong test of establishing: (a) A discovery of a valuable deposit of sand and gravel on each of its claims; and (b) The intrinsic value of the sand and gravel deposits was such as "would justify a person of reasonable prudence in making further expenditures upon the property with a reasonable prospect of success in developing a valuable mine.[2] *United States* v. *Coleman*, 390 U.S. 599 . . . (1968)." *Clear Gravel Enterprises, Inc.* v. *Keil*, 505 F.2d 180 (9th Cir. 1974), *cert. denied*, 421 U.S. 930 (1975); and *Verrue* v. *United States*, 457 F.2d 1202, 1203 (9th Cir. 1972). "The reasonably prudent man we are concerned with is the miner who has made his discovery and not the prospector who is still looking. *Humboldt Placer Mining Co.* v. *Secretary of Interior*, No. 74-2762, p. 3 (9th Cir. Jan. 6, 1977).

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[2] That is, whether the sand and gravel "in question could be extracted, removed and marketed at a profit on . . . July 23, 1955 when common variety sand and gravel deposits as here involved became no longer locatable. 30 U.S.C. § 611. *United States* v. *Barrows*, 404 F.2d 749 (9th Cir., 1968), *cert. denied*, 394 U.S. 974 . . . (1969)." *Clear Gravel Enterprises, supra* at 180-81.

Section 611, in its pertinent parts, reads: "No deposit of common varieties of sand, stone, gravel . . . shall be deemed a valuable mineral deposit within the meaning of the mining laws of the United States so as to give effective validity to any mining claim hereafter located under such mining laws: *Provided, however,* That nothing herein shall affect the validity of any mining location based upon discovery of some other mineral occurring in or in association with such a deposit."

Filing and Operations of Claims:

Pursuant to the existing statute, A. M. Murphy and Fred Pine (Murphy) filed placer mining claims numbered 1 through 22 on February 18, 1942 in a surface water wash of the Las Vegas Valley some 15 miles distant from the then center of the city of Las Vegas. The aggregate acreage of the several claims approximated 450 acres and contained a later estimated 20 million cubic yards of sand and gravel.

The evidentiary record is replete with eyewitness testimony that the sand and gravel contained in the area of the claims was of excellent quality for various construction uses and had values as such.

Shortly after the location and filing of the claims, Murphy's assignee, Southern Nevada Industries, Inc. (Southern), began operation within the confines of the claims and removed some 100,000 yards of material from a number of places up and down the wash. Due to the absence of washing water, Southern transported the raw materials to a site some five miles distant for crushing, screening, and washing. The refined material was used in the construction of an air force base situated northeast of Las Vegas. Southern closed the operation in 1943 and moved to an area near Henderson, Nevada for participation in a World War II construction project in that area. Thereafter, during the remainder of World War II and its aftermath, private construction in the area was curtailed.

From September, 1954 until during the year 1957, one E. H. Brawner (Brawner), as lessee of the claims, operated under a royalty agreement of not

less than $200 per month. It is undisputed that at this time Brawner's sand and gravel operation was farther from Las Vegas than were the operations of his competitors. Brawner's operation was also hampered to some extent by the absence of a water supply. Nevertheless he continued to operate the crushing plant within the limits of Claim 10 and materials were extracted from the crusher area and "pit" located within that claim and from other claims in the canyon. The market demand for the various types of sand and gravel, together with the lay of the various materials, dictated the location of the extractions. Brawner made profitable sales of the extracted materials through the year 1957.

The foregoing narration carries the operation on the claims through the critical pre-July 23, 1955 discovery period.[3] The following narration of operations subsequent to July 23, 1955 is pertinent, first, to the extent that the facts might bear upon the proper application, at the time of the contest proceedings, of the two prong "value" and "prudent man" or marketability test enunciated above; and, secondly, to the continuity of the marketability of the extracted materials.

On April 9, 1959, Frank R. Sullivan obtained title to the claims, extracted materials which were later stockpiled on the property, and sold some of the material as roofing granules.

On January 5, 1960, Charlestone acquired title to the claims and during 1961 Morrison-Knudsen, Inc.,

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[3] See note 2, *supra*.

as lessee, entered the claims, constructed a screening plant within the confines of Claim 10 and carried on processing operations. Unsuccessful efforts were made to drill screening water wells within Claims 9 and 10, and in 1962, at the cost of some $3,000, a well supplying adequate washing water was located within Claim 22. On July 15, 1964, Charlestone leased Claims 1 through 16 to Arden Sand and Gravel Co. (Arden) for a period of five years with an annual royalty of $12,000. Although Charlestone retained Claims 17 through 22, it agreed to furnish Arden with electrical power and washing water from the well within Claim 22.

Action of the Secretary:

During the summer of 1956 while the Brawner operations were in progress, the United States Bureau of Land Management in Nevada employed Messrs. Hill and Lovejoy (Hill), competent engineers and surveyors, to investigate the validity of the instant claims. Hill reported that Claims 1 through 22 encompassed a valuable discovery of sand and gravel deposits and were valid. The report constituted a comprehensive and informative discussion of the factors bearing upon a determination of marketability of sand and gravel deposits and of the quality of particular sand and gravel deposits as of July 23, 1955. After submission of the Hill report, the Bureau of Land Management affirmed the validity of the Brawner claims and removed the area of the claims from an open small tract classification.

Nine years later the Secretary employed Donald G. Fisher (Fisher),[4] a mining engineer, to investigate and report on the validity of the Charlestone claims. Fisher gathered hearsay information from competing sand and gravel operators in the area and made a visual examination of the claims in 1965, some ten years after the crucial date of July 23, 1955. Based upon his investigation, Fisher opined that *all* of the Charlestone claims were invalid for want of a discovery. The Secretary then used the Fisher report as a basis for the contest proceedings.

Administrative Proceedings:

Fisher was the Secretary's sole witness and his testimony comprised the only evidence in support of the contest. Fisher testified to the effect that his opinion was based upon information gained as a result of visual examination of apparent extractions from each of the claims in 1965 and again in 1969; review of all mineral reports, as well as the Hill report; and interviews with local sand and gravel dealers, including the present owners and the past operators of the claims. Further, he testified that his opinion was also based upon his familiarity with the Las Vegas area, where he had previously been employed by the Government in making validity determinations and market studies in mining contest cases. Fisher, using his version of the test of discovery, opined that "this was

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[4] Fisher had been previously employed by the Secretary in connection with other contests of sand and gravel claims within the Las Vegas vicinity.

a very sporadic operation . . . [I]t didn't appear to be an operation that could sustain a continuous operation over the years" and the claims were invalid for want of discovery. In his opinion, the crucial factors in the invalidity of the claims were the excessive distance of the claims from a market and the lack of washing facilities.

To rebut Fisher's testimony, Charlestone produced the deposition testimony of Hill. Hill's testimony reaffirmed the conclusion in his 1956 report that all of the claims were valid. He testified that his opinion of validity was based upon a personal inspection of the claims, an investigation of the actual history of the operation of the claims, and his knowledge of the marketability of the product resulting from the thorough study he had made in conjunction with Mr. Lovejoy.

Charlestone buttressed Hill's conclusions with the eyewitness testimony of several workers who had been employed at the extraction operations by Southern and Brawner.[5]

The decisions of the Administrative Law Judge and the Board reflect that each gave substantial weight to Fisher's testimony. At the conclusion of the hearing, the Administrative Law Judge found only two of the

[5] The record establishes actual sales from the claim sites and constitutes an even stronger showing of marketability than was made in either *Melluzzo* v. *Morton*, 534 F.2d 860 (9th Cir. 1976), or *Verrue, supra*. In those cases, this Court, notwithstanding a total absence of sales from the claim sites, reversed decisions of the Secretary that certain sand and gravel claims were invalid.

22 claims to be valid. On administrative review, the Board, placing even more credence on Fisher's opinion, found only one of the claims to be valid. Charlestone ultimately and successfully sought review of the latter decision in the District Court.

Discussion and Disposition:

Issue 1:

We conclude that the Board's exclusion of validity of Charlestone's claims, except as to Claim 10, is not supported by substantial evidence.

Our conclusion is, first, guided by the course set in *Walker* v. *Mathews*, 546 F.2d 814, 818 (9th Cir. 1976):

> "Substantial evidence means that a finding is supported by '"more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."' (*Richardson* v. *Perales* (1971) 402 U.S. 389, 401 . . .) In applying the substantial evidence test we are obligated to look at the record as a whole[6] and not merely at the evidence tending to support a finding."

Footnote 6 reads:

> "*See, Day* v. *Weinberger* (9th Cir. 1975) 522 F.2d 1154, 1156 ('But in determining whether there is substantial evidence to support the examiner's finding a reviewing court must consider both evidence that supports, and evidence that detracts from, the examiner's conclusion. We cannot affirm the examiner's conclusion simply

by isolating a specific quantum of supporting evidence.'); Davis, 4 Administrative Law Treatise § 29.03 (1958) ('". . . Evidence which may be logically substantial in isolation may be deprived of much of its character or its claim to credibility when considered with other evidence."'); and *Universal Camera Corp.* v. *N.L.R.B.* (1951) 340 U.S. 474, 487-88 . . . ."

Secondly, "opinions not supported by facts, and which are contrary to the physical facts and do violence to scientific principle or reason, are robbed of all probative value." *Weinberg* v. *Northern Pac. Ry. Co.*, 150 F.2d 645, 651 (8th Cir. 1945). *See Anderson* v. *Knox*, 297 F.2d 702, 719-20 (9th Cir. 1961); *United States* v. *Honolulu Plantation Co.*, 182 F.2d 172, 178 & n.15 (9th Cir. 1950); and *United States* v. *102.93 Acres of Land, Etc.*, 154 F. Supp. 258 (E.D. N.Y. 1957), *aff'd sub nom. United States* v. *Fox*, 257 F.2d 805 (2d Cir. 1958).

Finally, this Court has in the past refused to credit the testimony of Government witnesses on facts similar to those in the case at bar. In *Verrue*, *supra*, this Court affirmed the District Court's reversal of the Secretary's decision invalidating a sand and gravel mining claim for lack of discovery of a valuable mineral deposit. In reaching this conclusion, the Court noted that the crucial issue was marketability and that the testimony of the three Government witnesses "sheds no light on that issue" because none of them had been in the area of the mining claim during the crucial period "nor did any one of them have personal

knowledge of the sand and gravel market during that time." *Id.* at 1204.

Fisher's opinion, on which the Secretary exclusively relies, neither avoids the inadequacies noted in *Verrue*, *supra*, nor is it supported by the other facts in the record. It was based upon an investigation begun more than ten years after the close of the crucial period. Although he stated he was familiar with the Las Vegas area, there was no indication that he was familiar with that area during the crucial period. In addition, his opinion was not based upon personal knowledge of the sand and gravel market during that period. Rather, he gleaned his information solely from a visual inspection of the terrain, a review of reports and interviews with others, all conducted more than ten years after the crucial period. More importantly, his opinion was flatly contradicted by the Hill report which was based upon an investigation completed within one year of the crucial period and also by direct evidence of marketability supplied by persons who had actually witnessed substantial recoveries from the claims up and down the valley or wash. In light of these factors, we must conclude that the Board improperly credited Fisher's unfounded opinion of nonvalidity.

Issue 2-(a):

A discovery of valuable sand and gravel deposits on Claims 1 through 22, containing workable deposits of sand and gravel of like character and quality with

the material in Claim 10, is clearly established by the record.

Issue 2-(b):

The marketability of the pre-July 23, 1955 extractions can be tested by reason of: (1) Accessibility to the claims; (2) Bona fides of the operators in developing the claims; (3) Existence of market demand within reasonable proximity to the claims; and (4) Actual participation in the market. *See Clear Gravel Enterprises, supra* at 181.[6]

The relevant evidence in the record establishes that:

(1) Accessibility of Charlestone's Claims 1 through 22 was readily available. The area of the wash was not remote but, to the contrary, readily available to major public roads;

(2) Charlestone's predecessors in interest made a bona fide development and recovery of various grades of sand and gravel from

[6] Contrast with the holding in *Humbold Placer Mining Company* v. *Secretary*, No. 74-2762 at p. 6 (9th Cir. Jan. 6, 1977), where this Court reemphasized its holding in *Verrue, supra*, that " 'positive evidence in the record of marketability' was not offset by evidence of the lack of sales of material and the availability of comparable material from other sources.[2]"

Footnote 2 reads: "*In Melluzzo* v. *Morton*, 534 F.2d 860, 863 (9th Cir. 1976), we construed *Verrue* as 'holding that lack or insubstantiality of sales of material from the claims in question is relevant to the question of marketability. It is not, however, conclusive proof of lack of value. The inference to that effect, when all evidence is considered, can be found to have been overcome by evidence of marketability.' "

within the several claims during the pre-July 23, 1955 period;

(3) Market demand existed for the extracted grades of sand and gravel within reasonable proximity to the various claims; and

(4) The predecessors actually sold the recovered material in that market.

The evaluation as to whether Charlestone met tests (3) and (4) deserves further comment. Fisher's opinion of nonvalidity was based primarily upon: (a) An absence of washing water; (b) The sporadic operations of Southern and Brawner; and (c) The prohibitive distance of the claims from the market. We are convinced that each of those reservations was nullified by the only relevant evidence in the record.

The evidence established that Southern and Brawner did actually recover sand and gravel from the claims, transported those extractions for washing and sold the same on the market.

The seemingly sporadic operations by Southern and Brawner were a mirror of the building and construction industry in the Las Vegas area during and shortly after World War II. Continuous operation of a placer mining claim is not a per se requisite to proving the validity of that claim. Cessation of operation of any economic enterprise may be caused by innumerable factors totally beyond the bona fide intentions of the operator. Reason dictates that periodic cessation of operation of a placer mining claim, short of an intentional abandonment of the claim, need not defeat ultimate proof of validity.

Since a total absence of operation does not preclude a finding of validity (*Verrue*, *supra*), it follows that sporadic operation does not preclude a finding for validity. The Secretary does not contend there was a pre-July 23, 1955 abandonment of the claims by Brawner. In fact, as of July 23, 1955, Brawner was engaged in the profitable extraction of sand and gravel from the various claims.

The Fisher postulate of an excessive distance of the claims from the market is meaningless. Some competitors in the sand and gravel business are next door to a construction project; yet a distant competitor underbids and successfully competes with the next door neighbor. The inescapable fact is that market demand supported the recovery and sale of material from the claims.

The prudent person test has enough flexibility to allow a sand and gravel business operator to undertake an apparently marginal enterprise if it has a reasonable possibility of success. Relying on Fisher's opinion, the Secretary deemed Brawner to have been a foolhardy operator; yet in many circles, pre-July 23, 1955 Las Vegas area entrepreneurs would have been deemed astute.

Finally, we conclude that the District Court's finding that "at least the claims numbered 1 through 16 have been proved valid" is not clearly erroneous. Fed. R. Civ. P. 52(a).

Furthermore we agree with the District Court's conclusion that Charlestone must be permitted access to Claim 22 in order to utilize the water recovered

from the well in the operation of the other valid claims. However, we reach our conclusion upon a rationale other than that relied upon by the District Court.

It is agreed that the Murphy location notices were lawfully filed under the Acts of Congress. Each of the location notices, covering Claims 1 through 22, described a "piece of mineral bearing ground as a Placer claim" as distinguished from a claim location of any particular mineral, either surface or underground, within that tract of ground. "A placer location is the location in accordance with those acts [of Congress] of a tract of land for the mineral bearing or other valuable deposits upon or within it that are not found in lodes or veins in rock in place." *Webb* v. *American Asphaltum Min. Co.*, 157 F. 203, 204 (8th Cir. 1907). *See also* 1 American Law of Mining § 5.10 (1976).

We are satisfied that Charlestone, as Murphy's successor, had the right to appropriate and utilize as a mineral the water within any of the claims which met the above two prong test of value and success in development. It has been said that " 'Mineral' is a word of general language, and not *per se* a term of art. . . . It is not capable of a definition of universal application, but is susceptible to limitation or expansion according to the intention with which it is used in the particular . . . statute." *Bumpus* v. *United States*, 325 F.2d 264, 266 (10th Cir. 1963).

Since early times, water has been regarded as a mineral. "[T]he term 'mineral' has been held to em-

brace water, particularly subterranean water, irrespective of the character and quantity of salts and gases which may be in solution." 58 C.J.S. *Mines & Minerals* § 2(7) (1948). (Footnotes omitted). Water itself may be classified as a mineral. *United States* v. *Union Oil Co. of California*, No. 74-1574, p. 3 (9th Cir. Jan. 31, 1977).

The pertinent Acts of Congress which allow a prospector to enter and patent placer claims for valuable minerals do not expressly define water as a non-mineral. In *Union Oil Co.*, *supra* at 3, this Court hazards that "Congress was not aware of geothermal power when it enacted the Stock-Raising Homestead Act in 1916; it had no specific intention either to reserve geothermal resources or to pass title to [the Stock-raisers]." It is common knowledge that the successful recovery of many "hard" minerals from the earth and the utilization of the soft mineral of water therewith go hand in hand. 1 American Law of Mining § 2.71 (1976). Therefore, it would be incongruous for us to hazard that Congress was not aware of the necessary glove of water for the hand of mining and therefrom Congress impliedly intended to reserve water from those minerals allowed to be located and recovered. In any event we decline to do so.

The limitation in 30 U.S.C. § 611 on the location of claims for common varieties of certain named minerals does not apply to water. In fact, the express language of § 611 exempts from its operation "some other mineral occurring in or in association with such

deposit." Therefore, it is of no importance that the discovery of water within Claim 22 occurred after July 23, 1955.

The water recovered from the source under Claim 22 [7] undeniably has an intrinsic value in the desert area. There is by the nature of Charlestone's operations no evidence of a profitable market of the water per se for either domestic or irrigation uses. Nevertheless the only relevant evidence in the record demonstrates the existence of a profitable market of the water as a washing agent for the sand and gravel recovered from the valid claims. Although unwashed sand and gravel has a limited market, good quality sand and gravel in combination with water draws a premium market.

We are satisfied that Charlestone has shown a profitable market for the water recovered upon Claim 22 and its claim for the extraction of that water is valid.

The judgment of the District Court entered on November 8, 1974, vacating the decision of the Board dated January 18, 1973 and remanding the cause to the Secretary is affirmed, and the cause is remanded to the District Court for further order of remand to the Secretary consistent with the foregoing.

AFFIRMED AND REMANDED.

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[7] The District Court noted that the source of water under Claim 22 was present on the date of Murphy's notice of location.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

DC # CIV LV-2039 BRT

No. 75-1532

CHARLESTONE STONE PRODUCTS CO., INC.,
PLAINTIFF-APPELLEE

v.

CECIL D. ANDRUS, SECRETARY OF THE INTERIOR,
UNITED STATES OF AMERICA,
DEFENDANT-APPELLANT

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the District of Nevada and was duly submitted.

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the judgment of said District Court in the Cause be, and hereby is affirmed and remanded.

Filed and entered May 12, 1977.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEVADA

Civil No. LV-2039 BRT

CHARLESTONE STONE PRODUCTS CO., INC., PLAINTIFF

vs.

ROGERS C. B. MORTON, DEFENDANT

MEMORANDUM OPINION

This contest of a group of twenty-four placer mining claims was initiated by a contest complaint filed in the Nevada Land Office, Bureau of Land Management, on November 12, 1965. The contest attacks the validity of placer mining locations for sand and gravel known as Charlestone Claims numbered 1 through 22, No. 12A and No. 13A. After hearings and appeals in the administrative agency, the final decision of the Interior Board of Land Appeals, dated January 18, 1973 (9 IBLA 94), was to the effect that only Charlestone No. 10 placer claim is valid and that all the other claims are invalid. Reference is made to the decision of the Interior Board of Land Appeals for most of the facts pertaining to the property and to the proceedings.

After reviewing the entire record in this case, we believe that the only reasonable conclusion is that the decision is wrong and that an injustice has been done. The difficulty presented is in applying established law with respect to the scope of administrative review and established law concerning the validity of mining claims for sand and gravel to the undisputed facts in this case in order to achieve a just result.

First, it should be noted that throughout the administrative proceedings, at least one of the mining claims has been found to be unquestionably valid. The Administrative Law Judge found both Claim No. 9 and Claim No. 10 to be valid. The Interior Board of Land Appeals, on cross-appeals by the Government and the contestee, found only Claim No. 10 to be valid. The importance of this is that there is no dispute with respect to the mineral character of the deposit at and prior to July 23, 1955 when Congress removed common varieties of sand and gravel from location under the mining laws. It is also undisputed that all the twenty-four claims contain workable deposits of sand and gravel of like character and quality with the material in Claim No. 10. All but one of the claims was held invalid only because the material from all the claims could not be shown to be marketable at one time or within the near future.

The case for the Government before the Administrative Law Judge was rested on the testimony of Donald G. Fisher, a qualified mining engineer, whose opinion that all the claims were invalid was obviously of little weight because he was not thoroughly fa-

miliar with the history of the claims and the mining activity on the claims and had little or no knowledge of the economics of the market respecting sand and gravel in the Las Vegas Valley where the claims were located. He based his opinion of invalidity on his knowledge of the history of the market respecting sand and gravel in the Las Vegas Valley where the claims were located. He based his opinion of invalidity on his knowledge of the history of the claims, which the direct evidence produced by the contestee proved to be incorrect, and upon his opinion that "this was a very sporadic operation * * * it didn't appear to be an operation that could sustain a continuous operation over the years." We know of no established principle of mining law which would support these as reasons for invalidating a mining location under the established prudent man and marketability tests. There is no requirement that an operation must be continuous or sustained. The weakness of this type of evidence has been recognized by the Ninth Circuit in *Verrue* v. *United States*, 457 F. 2d 1202 (9th Cir. 1972), and by the Interior Board of Land Appeals in *United States* v. *Gibbs*, decided November 21, 1973 (13 IBLA 382).

This case is unique, as compared with other sand and gravel mining claim cases which have come to the attention of this Court, in the fact that in the Summer of 1956, two qualified engineers, Starr Hill, Jr. and Earl M. D. Lovejoy, employed by the Bureau of Land Management in Nevada were assigned to make a study and report on sand and gravel market-

ability in Las Vegas Valley, Nevada. The report was completed in November of 1956 and constitutes a comprehensive and informative discussion of the factors bearing upon a determination of marketability of sand and gravel deposits and of the quality of particular sand and gravel deposits, including the Charlestone claims, approximately as of the time the Act of Congress prohibited further location of these materials under the mining laws. At that time, the instant claims were being mined by the E. J. Brawner Sand & Gravel Co. under lease, which company was producing suitable material for the manufacture of concrete pipe, plaster and masonry sand. The deposition of Starr Hill, Jr. was taken in the instant contest proceedings on October 21, 1969, and Mr. Hill stated that it was his opinion at the time of his report that the Charlestone claims were valid mining claims, taking into consideration all the criteria applicable to such a determination. His opinion was based upon an actual physical inspection of the claims, an investigation of the history of the operation of the claims since they were located in 1942, and his knowledge of the marketability of the product resulting from the thorough study he had made in conjunction with Mr. Lovejoy. This is by far the most credible evidence in the record respecting the quality and marketability of the deposit. The evidence shows that with respect to quality, the deposit of sand and gravel in the Charlestone claims is the best in the Las Vegas Valley.

The Brawner company operated under its lease until 1959. In 1960, the contestee acquired the claims,

and in 1961, Morrison-Knudsen Company produced coarse aggregates from the claims but other production was hampered because of lack of water. Earlier unsuccessful efforts had been made to drill wells on Claim No. 9 and Claim No. 10. In 1962, the contestee was successful in obtaining a producing well on Claim No. 22. On July 15, 1964, Charlestone Stone Products, Inc., the contestee, entered into a lease with Arden Sand & Gravel Co., Inc. conveying claims numbered 1 to 16, inclusive, for a period of five years with an option to renew for an additional period of five years on the basis of a production royalty per yard but subject to a minimum royalty of $12,000 per year, payable in quarterly installments. The lease also provided for the lessor to install a power line to the claims and to make water available to the lessee from the well on Claim No. 22. It is notable that this lease was entered into before the Government contest was initiated and after the Bureau of Land Management had affirmed the validity of the claims (Ex. J) upon inquiry from the Nevada Department of Water Resources. In fact, the record shows that after the November 1956 report made by Hill and Lovejoy, the Bureau of Land Management had considered the Charlestone claims to be valid and had removed the area of the claims from a small tract classification which had theretofore been made.

There is nothing in the evidence which would support even a suspicion that the agreement entered into on July 15, 1964 between Charlestone Stone Products, Inc. and Arden Sand & Gravel Co., Inc. was anything

but a genuine agreement. It provided for the conveyance for a term of years of sixteen of the claims in question at a guaranteed minimum royalty of $12,000 per year. Any inference that the agreement was fictitious or "window dressing" was dispelled by the fact that it conveyed only sixteen claims and the lessor retained claims numbered 17, 18, 19, 20, 21 and 22 (which had the well) for its own operations. If this had been a fictitious agreement entered into in anticipation of a Government contest of the claims, such deviousness would have suggested a lease of all the claims. In fact, there is no suggestion anywhere in the record, in the findings of the Administrative Law Judge, or in the findings of the Interior Board of Land Appeals that this is anything but a genuine agreement. Of course, performance of the agreement was frustrated when the Government saw fit to initiate the contest proceedings in November of 1965, basing its contest solely on the uncorroborated and relatively weightless opinion evidence of Mr. Fisher.

The success of the contestee in obtaining a well on Claim No. 22 and the agreement entered into on July 15, 1964 are substantial evidence that the owners of the claims could have sold and extracted material from these claims at a profit prior to July 23, 1955. There is no reason to suppose that the same well could not have been obtained in 1954 and the finding of a water supply was a major circumstance justifying an investment of from $200,000 to $300,000 for a large operation. See: *United States* v. *Gibbs*, *supra*.

This is the first case this Court has encountered in which present marketability of the deposit has been established by proof of a genuine agreement for lease of the deposit with a substantial guaranteed minimum royalty. The existence of these facts, however, seem to be well-nigh irrefutable proof of marketability. The Administrative Law Judge and the Interior Board of Land Appeals ignored this evidence. In this respect, the final action of the administrative agency was arbitrary and capricious and not supported by the evidence. We see no rationality in a conclusion that proof of marketability can be established only by direct sales from the property in small quantities.

Operations under the agreement dated July 15, 1964 were frustrated by the initiation of the contest proceedings which made it imprudent to invest $200,000 or more in a plant which was anticipated in order to implement the operations under the lease. Of course, the lessor and lessee had no way of anticipating that final determination of the rights of the parties in the administrative proceedings would consume some eight years.

The decision of the Administrative Law Judge and the Interior Board of Land Appeals with respect to claims numbered 12A and 13A is obviously correct. These locations are invalid because made after July 23, 1955, and the finding that the material is a common variety of sand and gravel is supported by the evidence despite the fact, as we have already observed, that this is the best deposit with respect to quality in the Las Vegas Valley.

A few observations may be pertinent with respect to the quantities of the material in this deposit. The Hill and Lovejoy report estimated reserves of 20,000,000 cubic yards. That report also makes it clear, however, that the method of mining is an important factor with respect to cost. The surface material may be bulldozed—the cheapest method. If a pit is excavated, more expensive equipment and more personnel to operate a shovel and trucks are required. Although there is evidence in the record that at least in some locations the deposit of quality sand and gravel may exist in depth in excess of two hundred feet, it does not follow as a matter of course that sand and gravel at that depth could be economically mined in an open pit operation. Mining at that depth is obviously much more expensive; also hazardous. There is no evidence in the record from which the quantity of reserve material which can be economically mined can be reliably estimated and it is pure guesswork and speculation for the Government to limit the claims validated to No. 10 or No. 10 and No. 9.

It is the opinion of this Court that at least the claims numbered 1 through 16 have been proved valid and that access to Claim No. 22 must be permitted so that the water produced from the well on that claim may be made available to the operations on the valid claims.

The decision of the Interior Board of Land Appeals dated January 18, 1973 is vacated and set aside and this matter is remanded to the Department of the

Interior for further proceedings consistent with this Memorandum Opinion.

Dated: November 7, 1974.

/s/ Bruce R. Thompson
United States District Judge

APPENDIX D

[SEAL]

UNITED STATES
DEPARTMENT OF THE INTERIOR

Office of Hearings and Appeals
Interior Board of Land Appeals

4015 Wilson Boulevard
Arlington, Virginia 22203

UNITED STATES

v.

CHARLESTONE STONE PRODUCTS, INC.

IBLA 71-111 Decided January 18, 1973

Appeals from decision of Administrative Law Judge Graydon E. Holt in mining contests Nevada 065729 A to Q, inclusive, and Nevada 065731 A & B.

Decision affirmed in part, reversed in part.

Mining Claims: Common Varieties of Minerals: Generally—Mining Claims: Determination of Validity—Mining Claims: Discovery: Marketability

To satisfy the requirements for discovery on a placer mining claim located for a common variety of sand and gravel prior to July 23, 1955, it must be shown that the exposed material could have been extracted, removed and marketed at a profit on that date, and further that the market for

the material from the claim has continued without substantial interruption to the present time; where such a showing is made, a contest against that claim is properly dismissed.

A placer mining claim located for a common variety sand and gravel prior to July 23, 1955, from which claim mineral material was extracted, removed and marketed at a profit on that date, and which mineral material could have participated in the same market without interruption to the present time, is properly declared to be a valid mining claim.

Mining Claims: Common Varieties of Materials: Generally

To satisfy the requirements for discovery on a placer mining claim located for common varieties of sand and gravel before July 23, 1955, it must be shown that the materials within the limits of the claim could have been extracted, removed, and marketed at a profit as of that date. Where the evidence shows that there is an abundant supply of similar sand and gravel in the area of the claim, that sand and gravel was being produced and sold in the area on July 23, 1955, and that no sand and gravel had been or was being marketed from the claim as of that date, the fact that the material on the claim is sufficient both as to quantity and quality, as is the abundant supply of similar material found in the area, is insufficient to show that material from this par-

ticular claim could have been profitably removed and marketed on July 23, 1955, and the claim is properly declared null and void.

Mining Claims: Discovery: Marketability

To satisfy the requirements of discovery on a placer mining claim located for sand and gravel prior to July 23, 1955, it must be shown that the deposit could have been extracted, removed, and marketed at a profit as of that date and not as of some prospective date, and where claimants fail to make such a showing the claim is properly declared null and void.

Mining Claims: Contests—Mining Claims: Determination of Validity

To establish a prima facie case and to meet its burden of proof in a mining contest, the government is required only to show by competent evidence that there has been no discovery of a valuable mineral deposit.

Mining Claims: Common Varieties of Minerals: Generally

Deposits of high quality sand and gravel, suitable for use without expensive processing, but the market for which is limited to use for road base, asphalt mix, concrete aggregate and rock chips, the same purposes for which other widely available, but less desirable, deposits are marketed at the same price, are common varieties of sand and gravel not locatable since these facts do not

give them a special, distinct value as defined in the Act of July 23, 1955.

Mining Claims: Common Varieties of Minerals: Generally—Mining Claims: Determination of Validity

Where a placer mining claim was located for common variety sand and gravel prior to July 23, 1955, and sand and gravel was mined, removed and marketed at a profit before and on July 23, 1955, it is proper to consider the claim as having demonstrated a present marketability as of that date.

APPEARANCES: W. C. Lamoreaux, Esq., Salt Lake City, Utah, and E. A. Hollingsworth, Esq., Las Vegas, Nevada, for the contestee; Otto Aho, Esq., Field Solicitor, United State Department of the Interior, Reno, Nevada, for the contestant.

OPINION BY MR. HENRIQUES

Contestee appeals from the decision of Administrative Law Judge Graydon E. Holt [1] declaring null and void its Charleston, Charleston Nos. 1-8, 11-12, and Charleston 12A and 13A placer mining claims. Contestant appeals from the decision of the Judge declaring valid Charleston Nos. 9 and 10 placer mining claims.

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[1] The change of title of the hearing officer from "Hearing Examiner" to "Administrative Law Judge" was effectuated pursuant to order of the Civil Service Commission, 37 F.R. 16787 (August 19, 1972).

The contest was initiated by the filing of a complaint in the Nevada Land Office, Bureau of Land Management, on November 12, 1965. In the complaint, the contestant alleged that:

1. Valuable minerals have not been found within the limits of the claims so as to constitute a valid discovery within the meaning of the mining laws.
2. No discovery of a valuable mineral has been made within the limits of the claims because the mineral materials present could not be marketed at a profit prior to the Act of July 23, 1955.

The contestee filed an answer controverting these allegations and a hearing was held before an Administrative Law Judge on October 28 and 29, 1969, at which time both sides presented supportive testimony and submitted various evidentiary exhibits. On October 30, 1970, the Judge handed down his decision from which both sides have taken an appeal. The crucial determinations of the Judge were as follows:

1. That the claims embraced a common variety of sand and gravel, such as was removed from mineral location by the Act of July 23, 1955;
2. That marketability as of July 23, 1955, was shown only as relates to Charleston Claim No. 10;
4. That all other claims were null and void for the lack of a valid discovery.

Before discussing the many points raised on appeal it would be helpful to examine the historical background of the claims in question. The Judge very succinctly stated the history of the claims and his statements, set out below, are hereby adopted:

> The Charleston and Charleston Nos. 1-22 placer claims were located February 18, 1942, by A. M. Murphy and Fred Pine. They quitclaimed the claims to Frank R. Sullivan on April 9, 1959, and he quitclaimed the claims to the Charleston Stone Products, Inc., on January 4, 1960. The Charleston Nos. 12A and 13A were located on September 15, 1961, by the contestee-corporation. The claims embrace a massive sand and gravel deposit in a canyon extending from west to east over a distance of four miles. The descending gradient of the canyon floor is approximately 375 feet per mile eastward. The center of the claims is 15 miles northwest of Las Vegas, Nevada, and they are accessible to the city by road. The quality of the sand and gravel is excellent for such uses as road bases, concrete and plaster aggregate, and leach rock. The quantity has not been determined but the parties were in substantial agreement that there is [*sic*] at least 20,000,000 cubic yards of material and probably a great deal more.
>
> Prior to 1940 Las Vegas was a relatively small community and much of the land surrounding the city was public land. During that period whenever a builder or contractor wanted small quanti-

ties of sand or gravel he merely took the material from the most convenient location on the public land. The material on the Charleston group of claims was used in this manner for many years when there was a construction project in the area. In recent years the city has become an industrial complex and much of the surrounding public land has been disposed of under various land laws and regulations. Because of this loss there is now a limited number of sites on remaining public land to secure quality sand and gravel. The land on which the Charleston claims are located was at one time reserved for small tract classification by the Bureau of Land Management. Later the Bureau determined that the canyon was subject to flash floods and was not suitable for small tracts. The Bureau then revoked the classification. There was no suggestion that the land within the claims is valuable for a purpose other than for the mining of sand and gravel.

Shortly after the claims were located in 1942, they were leased to Southern Nevada Industries, Inc. This company used the sand and gravel at first to make concrete blocks and later for the construction of the runways at Nellis Air Force Base, a short distance north of Las Vegas. The company had the material trucked to their plant some 10 miles north of the city. In the plant it was crushed, screened and washed. Mr. R. J. Kaltenborn, President of the company at the

time, testified that the company removed from 75 to 100 thousand cubic yards of material at 5 cents a yard royalty during 1942 and 1943. In the latter part of 1943 the company opened a pit near Henderson, 13 miles southeast of Las Vegas, and discontinued using materials from the claims.

The next major user of the claims was E. H. Brawner. Mr. Brawner leased the claims on Septemper 18, 1954, for a five-year period and agreed to pay a royalty of 10 cents a cubic yard for material removed but not less than $200 per month (Exh. X-5). A number of witnesses recalled the Brawner operation on the claims between 1954 and 1958 and described his activities in considerable detail. Probably the most accurate description can be found in the deposition of Starr Hill, Jr. In 1956 Mr. Hill and Earl M. P. Lovejoy, as mining engineers for the Bureau of Land Management, made a marketability study of the sand and gravel industry in the Las Vegas Valley. Their report is dated November 1956 (Deposition Exh. A).

Mr. Hill testified that he and Mr. Lovejoy observed the Brawner operation in September and October 1956. The equipment consisted of a crusher and grader which was located in a large pit on Claims 9 and 10. At that time Mr. Brawner had produced 15,000 yards from the pit for use as plaster and masonry sand, concrete blocks and conduit pipe aggregates. The Stocks Mill and Supply Company was the major purchaser of the

material. Mr. Hill described the deposit and expressed the belief that it was the best material he had seen in the valley from the standpoint of quality and quantity. The material on the western end of the claims is relatively free from fines or silt. On the eastern and lower end the amount of fines in the deposit increases. The Brawner deposit was the farthest operating deposit from Las Vegas at the time but many of the other deposits had excessive fines. Statistical information from the report is that the depths of the deposit exceeds 120 feet, calculated reserves 20,000,000 cubic yards, and the cost of a semi-portable plant was estimated to be $76,000. On page 42 of the report Mr. Hill listed the future orders for November 1956 at $6,800, for December 1956 and January 1957 at $5,950 and for February, March and April 1957 at $23,000. Mr. Brawner had no water to wash the fines in the material but did have a blower to remove the silt and other fines. Mr. Hill expressed the belief that the claims were valid.

The Brawner lease was canceled as a result of a judicial decree dated August 13, 1959. The claim owners had prayed for such cancellation and a judgment of $8,000 for the nonpayment of royalties (Exh. X-5).

Before further discussing the evidence adduced, two issues should be examined. First, the requirements for a discovery are now well established. A discovery exists:

> [W]here materials have been found and the evidence is of such a character that a person of ordinary prudence would be justified in the further expenditure of his labor and means with a reasonable prospect of success in developing a valuable mine * * *. *Castle* v. *Womble*, 19 L.D. 455, 457 (1894); *United States* v. *Coleman*, 390 U.S. 599 (1968).

This "prudent-man" test has been refined by a requirement that showing be made that the mineral in question can be extracted, removed and marketed at a profit. *United States* v. *Coleman, supra.* This "marketability test" has been specifically held to be applicable in determining the validity of sand and gravel claims in the Las Vegas area. *Palmer* v. *Dredge Corp.*, 398 F.2d 791 (9th Cir. 1968), *cert. denied*, 393 U.S. 1066 (1969). And since the Act of July 23, 1955, 30 U.S.C. §§ 611 *et seq.* (1970), withdrew common varieties of sand and gravel from location under the mining laws, it is necessary that the claimant for such materials show marketability as of that date. *Palmer* v. *Dredge Corp., supra; United States* v. *Clear Gravel Enterprises, Inc.*, 2 IBLA 285 (1971).

Furthermore, under well settled rules:

> * * * it must be shown * * * that there was a valid discovery on each claim at the time of the application for patent. That is, irrespective of the date on which a discovery may have been made, the claims are now invalid if, because of

> exhaustion of the deposits, or change of economic conditions, cessation of a market for the material, or some other cogent factor, the value of the materials will not justify further expenditures for the development of a mine.

United States v. *Paul M. Thomas, et al.*, 1 IBLA 209, 78 I.D. 5, 19 (1971). This principle is of equal applicability to contest proceedings initiated prior to application for mineral patent. *See Mulkern* v. *Hammitt*, 326 F.2d 896 (9th Cir. 1964). So it is clear that not only is a showing of marketability as of July 23, 1955, required, but that the contestee must also establish that in the interval from the date of the withdrawal of common varieties of sand and gravel from mineral location to the date of the contest proceedings a market for the common variety mineral has continued without any prolonged interruption. This requirement flows from the fact that if the marketability of the common variety mineral for which the claim was located is lost, the validity of the location is similarly lost and the claim may be declared null and void after contest proceedings. Mining claims are properly declared null and void for lack of present discovery of a valuable mineral deposit where there is no market or any reasonable prospect for a future market for the mineral for which the claims were located. *United States* v. *Estate of Alvis F. Denison*, 76 I.D. 223 (1969), *Mulkern* v. *Hammitt*, 326 F.2d 896 (9th Cir. 1964). Since the Act of July 23, 1955, *supra*, expressly removed common varieties of sand and gravel from location

under the mining laws, later recovery of a profitable market cannot serve to resuscitate such invalid claims.

Second, the contestee strenuously contends that the Judge erred when he held that a showing of marketability of the sand and gravel deposit *on each claim* was required to validate that claim. It cites the decision rendered in *United States* v. *Alfred N. Verrue*, 75 I.D. 300, 306 (1968):

> * * * [I]t must be shown * * * that the particular deposit itself can, and could at the critical date, be mined and marketed at a profit.

From this it argues that proof of marketability on any one claim should be sufficient to establish marketability on all claims which embrace the same deposit.

Suffice it to say that such is not the law as consistently applied by this Department. There must be evidence as to the marketability of each of the claims. *See e.g., United States* v. *Henrietta Bunkowski and Andrew Julius Bunkowski*, 5 IBLA 102, 120, 79 I.D. 43, 51-52 (1972), "The appellants must show *as to each claim* that they have found a mineral deposit which satisfies the prudent man rule . . ." (emphasis in original); *United States* v. *Frank and Juanita Melluzzo*, 76 I.D. 181, 189 (1969), "The appellants must show *as to each claim* that they have found a valuable mineral deposit and that a prudent man would have been justified in the further expenditure of his labor and means with a reasonable prospect of success in developing a valuable mine *on that claim*."

(emphasis in original) *See also Osborne* v. *Hammitt*, Civil No. 414 U.S. D.C.D. Nev. August 19, 1964.

Contestee's argument applied to the location of common varieties of sand and gravel, would prove too much. Under its auspices a person could locate an entire desert and establish its marketability by selling sand and gravel from a single location. The fact that contestee's location followed the bed of a wash and that it has not attempted to embrace an entire alluvial fan would not limit the scope of the rule it seeks to have implemented.

Its argument that the effect of such a holding is to require competition with itself has been pressed before. *See United States* v. *Fisher Contracting Company*, A-28779 (August 21, 1962). There, as here, the contestee has misunderstood the thrust of the requirement. It is not required that the claimant produce from each claim, but that it show marketability from each claim. Production is not a prerequisite for a finding of marketability. See *United States* v. *Howard S. McKenzie*, 4 IBLA 97 (1971). The Department, however, has recognized the difficulty of proving marketability without showing any sales, pointing out in numerous cases that, while the fact that no sale had been made at the critical time is not controlling in itself, the fact that nothing is done toward the development of a claim after its location may raise a presumption that the market value of the minerals found therein was not sufficient to justify the expenditure required to extract and market them. *United States* v. *E. A. Barrows*

and Esther Barrows, 76 I.D. 299, 306 (1969), and cases cited.

Testimony that there was a general demand for sand and gravel in the Las Vegas area of the type present on these claims is insufficient to satisfy the present marketability test; the claimants must show the existence of an actual demand for material from specific claims as of July 23, 1955. *See United States* v. *William A. McCall, Sr., et al.*, 2 IBLA 64, 78 I.D. (1971).

The contestee argues that the Government failed to present a prima facie case as to the invalidity of the claims. What is required of the Government to sustain its burden has been stated in the past in a variety of ways. It has been said that: "[p]*rima facie* means that the case is completely adequate to support the government's contest of the claim and that no further proof is needed to nullify the claim." *United States* v. *Henrietta Bunkowski and Andrew Julius Bunkowski, supra.* This burden has been held to have been met where there is "testimony * * * by a government mineral examiner that he has examined the mining claims and the workings thereon but found no evidence of a valuable mineral deposit." *United States* v. *Harold H. Benson*, A-31061 (September 4, 1969); *United States* v. *L. B. McGuire*, 4 IBLA 307 (February 4, 1972). In the case at bar, Donald Fisher, a mining engineer employed by the Department of the Interior, testified as to his investigations of the claims, which included an examination of the land as well as interviews with various

sand and gravel operators in the Las Vegas valley and from which he concluded that there had been no discovery as of July 23, 1955, because of the excessive distance to Las Vegas market and the production of other competitors in the area. Thus, the Government established a prima facie case of invalidity under the requirements set out above.

The Government having presented a prima facie case, the burden of proof was on the contestee to establish a discovery as to each claim. To expedite the consideration of the evidence and testimony presented in the hearing, a synopsis of the testimony of witnesses which have relevance to this issue follows.

The Government witness, Fisher, testified that from the size of the pits remaining he estimated that the following quantities had been extracted: from the Charleston No. 4, 1,370 cubic yards; No. 6, 100 cubic yards; No. 7, 55 cubic yards; No. 9, 4,485 cubic yards; No. 10, 84,400 cubic yards; No. 14, 37,700 cubic yards; No. 16, 15,615 cubic yards; No. 17, 24,485 cubic yards; No. 18, 350 cubic yards; No. 21, 2,830 cubic yards. Two factors, however, must be kept in mind in dealing with these figures. First, they do not represent the amount of material removed as of July 23, 1955, but rather indicate the total amount taken through 1965, and, in some minor cases, thereafter. The second point is that Claims Nos. 1-10 lie directly in a wash and thus are subject to fill in occurring as a result of flash flooding. Therefore, it is possible that deposition has erased evidence

of greater excavations than were indicated by Fisher's calculations.

Fisher also testified that the haul from the main pits located on Claim No. 10 to the Las Vegas market was 15 miles and that in 1955 it would have resulted in excessive costs making operations on the claims unprofitable.

The Government introduced a report, written in 1961 by Edgar A. Hollingsworth, contestee's attorney, who at that time was employed by the Bureau of Land Management, Department of the Interior, which in reference to the termination of the Brawner operations declared: "According to the other operators in the area, the excessive length of the haul necessary to get finished products to market caused the company to cease its operations."

The contestee presented a number of witnesses. Rae Allen Wheeler, Jr., who had been in a trucking business in Las Vegas for 25 years, testified that he hauled approximately 300 tons of leach rock a day from Claims Nos. 4, 6, 16, 17, and 21, or a total of 3,000 to 4,000 tons a month from the middle of 1954 to 1958. This leach rock was for use in a sewage plant then under construction. The witness admitted that since that time he had not hauled any leach rock to the sewage plant.

Vernon Frehner, a contractor and trucker in the area, testified that he hauled approximately 5,000 cubic yards of road chips from 1954 to 1957 or from 1956 to 1957 from the Charleston claims and that he got "some of it" about a quarter or a half mile up

the wash from the pit on Claim No. 10, which would put the extractions either within Claims Nos. 6, 7 or 8. He also declared that he generally hauled from Claims Nos. 11 and 12.

H. Guy Jacka, superintendent of streets for the city of North Las Vegas, testified that he had purchased several thousand tons of rock chips annually from 1954 to 1958 from Brawner. He declared that he was familiar with the claims and that the material had come from Claims Nos. 13, 13A and 14.

The testimony of Harrison S. Stocks, Chairman of the Board of Directors of the Stocks Mill and Supply Company, was secured by deposition. Stocks declared that he had used material from the area of the claims for more than 30 years for his concrete aggregate and plaster sand business. The materials had been obtained from Claims Nos. 8, 10, 11, 12, 14 and 15. While the exact amount obtained was unclear, Stocks testified that fairly large quantities were removed. Stocks further testified, however, that beween 1948 and 1964 his company had very little interest in the claims. He also stated that Brawner did not have a processing plant to wash his material and as a result could not sell sufficient material.

Herman J. Young testified that after the contestee-corporation acquired the claims in 1960, he conducted an investigation on behalf of Morrison-Knudsen Construction Company to determine the feasibility of operating a plant on the claims for all types of aggregates such as base coarse, asphalt coarse, and concrete aggregate. A screening plant was constructed on

Claim No. 10 and was in operation sporadically from 1963. He planned a much more elaborate plant to crush, grade and wash the material but, owing to internal dissension within the company, he was not able to construct such a plant. Young expressed the belief that a screening plant alone was not feasible but that a complete plant to produce all potential sand and gravel products would be profitable. In addition to the operation on Claim No. 10, Morrison-Knudsen produced 37,000 cubic yards of type 1 fill material from Claim No. 14 during this period. Morrison-Knudsen paid the contestee $7,071 for 28,284 yards of this material in 1963 and 1964 (Exhibits N, O, and P). When questioned regarding the reserves of aggregate remaining on Claims Nos. 9 and 10 he estimated that there were approximately 48,000 cubic yards for each foot of depth which would amount to 4,800,000 cubic yards at a depth of 100 feet.

John C. Godfrey, Secretary of Charleston Stone Products, Inc., testified that in recent years the corporation excavated a well with ample water on Claim No. 22 at a cost of $13,000 and installed a large storage tank for use in the washing of gravel. After securing this water, the corporation negotiated a lease agreement with Arden Sand and Gravel Company and Stocks Mill and Supply Company. The lease dated July 15, 1964 (Exh. B), provides for minimum royalty of $12,000 per year and requires the contestee to construct a power line from the nearest available supply point to the well on Claim No. 22. The lease contemplated that the Arden Sand and Gravel Com-

pany would produce sand and gravel products and that the Stocks Mill and Supply Company would purchase the material for use as concrete mixed in its aggregate business.

Two other witnesses testified that they made removals of materials from various claims. Another testified that his company (Concrete Conduit) purchased approximately 22,000 cubic yards in two years commencing sometime after 1965, the material coming from Claim No. 10.

Contestee contends that the sand and gravel deposits located on each of the claims is an uncommon variety with the result that it is not required to prove marketability as of July 23, 1955, but only as to the time of the institution of contest proceedings. The relevant statute provides, *inter alia*, that:

> No deposits of common varieties of sand, stone, gravel, pumice, pumicite, or cinders and no deposit of petrified wood shall be deemed a valuable mineral deposit within the meaning of the mining laws of the United States so as to give effective validity to any mineral claims hereafter located under such mining laws. * * * "Common varieties" as used in sections 601, 603, and 611 to 615 of this title does not include deposits of such materials which are valuable because the deposit has some property giving it *distinct and special value.* * * * (Emphasis added.) 30 U.S.C. § 611.

The regulations regarding common varieties are found in 43 CFR 3711.1(b):

> "Common varieties" includes deposits which, although they may have value for use in trade, manufacture, the sciences, or in the mechanical or ornamental arts, do not possess a distinct, special economic value for such use over and above the normal uses of the general run of such deposits. * * *

The Department has interpreted the Act and regulations so as to require an uncommon variety of sand, stone, etc., to meet two criteria: "(1) that the deposit have a unique property, and (2) that the unique property give the deposit a distinct and special value. Possession of a unique property alone is not sufficient. It must give the deposit a distinct and special value. The value may be for some use to which ordinary varieties of the mineral cannot be put, or may be for uses to which ordinary varieties of the mineral can be or are put; however, in the latter case, the deposit must have some distinct and special value for such use." *United States* v. *U. S. Minerals Development Corporation*, 75 I.D. 127, 134 (1968).

The criterion for determining whether a deposit of sand and gravel claim contains an uncommon variety is whether the material from the deposit commands a higher price in the market place or has uses for which ordinary varieties would be unsuited. *United States* v. *U. S. Minerals Development Corporation, supra.* The Judge in the case at bar held that "the sand and gravel on this group of claims are high quality materials but used only for the same purposes as many

other deposits of sand and gravel in the Las Vegas Valley. There was no evidence that the materials have a special and distinct value for these uses." Accordingly, he held that the deposit must be considered a common variety as defined in the Act of July 23, 1955, *supra*.

The contestee takes vigorous exception to this finding and argues that for a variety of reasons the deposit is unique.[2] A close reading of the Judge's decision, however, reveals that he did not controvert this contention but rather found that there was no evidence, even assuming the presence of unique properties, that these properties imparted a distinct value to the deposit.

On this point, rather than attacking the Judge's findings of fact, the contestee argues that the position of the Department is unsustainable by any fair reading of the statute. It argues that the Department is limited to a consideration of the intrinsic properties of the mineral and that by relating its special value to its proposed use, the Department has violated the intent of the Congress in enacting section 3, Act of July 23, 1955, *supra*.

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[2] Among the qualities which he contends might give the deposit unique value are: high specific gravity; marked resistance to abrasion; insignificant reactivity; and absence of caliche. In light of the disposition of this issue, *infra*, it is not necessary to decide whether the conjunction of the characteristics set out are sufficient to give the deposit a unique value.

The difficulty with the contestee's position is that the statute requires that the deposit, to be uncommon, must have "some property giving it distinct and special *value*." Valuation, by its nature, requires advertence to exogenous factors. Gold has value in relation to the scarcity of its occurrence. By the same token, to speak of the value of so ubiquitous a commodity as sand or gravel without reference to its use is to shovel smoke. In dealing with such commonly occurring minerals consideration of prospective use is an integral adjunct to any attempt to ascertain value, and particularly to determine "special value" as required by the clear statutory language. The consideration of prospective use is not extrinsic in the sense of the location of the deposit; rather it is part and parcel of the evaluation of the deposit mandated by Congressional intent. As such, Departmental practice is clearly in accord with the statutory provisions.

As there has been no evidence introduced that the sand and gravel occurring in the deposit can call forth a higher price for any of its destined uses, even assuming *arguendo* that it is of superior quality, the Judge was correct in holding that the minerals were a common variety. And, a fortiori since the Charleston Claims Nos. 12A and 13A were not located until after July 23, 1955, they cannot be the subject of a valid discovery.

On the issue of marketability the Judge found that:

> "Mr. Brawner was operating from Claim 10 and was utilizing material from Claim 9 at the rate of approximately 5000 yards a year * * * As to the latter part of 1955 or in 1956 the Brawner operation would have been sufficient to validate Claim 10 and, as the source of the reserve material, Claim 9.

The government raises a number of contentions regarding this finding. First, it argues that the removals, at the rate of 5,000 cubic yards annually, represent such a small amount of income that they should be considered *de minimim. See, e.g., The Atchison, Topeka & Santa Fe Railway Co.* v. *Emma Mae Cox*, 4 IBLA 279 (January 31, 1972). It is noted in the record, however, that Mr. Brawner, as a lessee had agreed to pay a minimum royalty of $200 a month for the right to operate from the claims. Thus, to the lessors, the annual income from the claims would be the $2,400 per year rental. It is, of course, true that the rental was based on the right to mine all of the claims. But in point of fact, the Brawner operation at the critical date was primarily limited to Claim No. 10, and the valuation he put on its worth by limiting his activities to its area, while obligating himself to the full annual rental, is certainly probative of the claim's real marketability.

The government further contends that even granting the marketability of the material on Claim No. 10 as of July 23, 1955, this marketability was lost

between that date and the initiation of the contest proceedings. On this point the Judge found that:

> * * * there has been a market for the material from Claims 9 and 10 since 1955. What was lacking was not a market, but an operator-lessee with the proper equipment to produce the material.

The government contends that there was no production from 1957 to 1965. The government's witness Fisher testified, however, that during 1959 and 1960 Frank R. Sullivan, who in 1959 had acquired the claims from the original locators, was reported "* * * to have produced and stockpiled considerable amounts of sand and gravel on the claims. * * *" Fisher subsequently related a conversation with Sullivan in which the latter declared that the material removed "* * * was used when he had the claims for roofing granules at Nellis Air Force Base." Further, the lack of production from 1960 to 1963 was adequately explained by Young as the result of internal friction within Morrison-Knudsen, and certainly the contract negotiations between Charleston Stone Products, Inc. and Stocks Mill and Supply Co. and Arden Sand and Gravel, culminating in a beneficial agreement, have not worked a termination of the market for the material from Claim No. 10. Thus, there was no loss of market as regards Claim No. 10, and accordingly, we find that the Judge correctly validated Claim No. 10.

The government also argues that the Judge erroneously validated Claim No. 9 as a source of reserve material. Two points are salient on this issue. The Judge had already found that 5,000 cubic yards of material were mined annually from Claim No. 10, with some overlap into Claim No. 9. It is stated in the record that the estimated reserves on Claims Nos. 9 and 10 are in excess of 1,000,000 cubic yards of useable material. At the rate of removal occurring in 1955, the Judge's decision provides as a reserve a 200-year supply. This is far in excess of the reserve normally granted, *see United States* v. *Robert E. Anderson, Jr.*, 74 I.D. 292 (1967). Even utilizing the Judge's stated rationale it is difficult to see how Claim No. 9 could be validated as a source of reserves.

A more basic problem is, as was pointed out by the Government, the Judge's misunderstanding of 43 CFR 3711.1(b), as it relates to reasonable reserves. A claim is not validated *as* a reasonable reserve; rather, the presence or absence of a reasonable reserve *within* the claim is looked to in determining the present marketability thereof. *See United States* v. *William A. McCall and R. V. Kaltenborn*, 1 IBLA 115, 122 (1970). There must be independent evidence of the present marketability of a claim held as a reserve in order to validate that claim. *United States* v. *Neil Stewart*, 5 IBLA 39, 55 (1972). Thus, Claim No. 9 must rest upon its own factual situation and the Judge's validation of it "as a source of reserve material" must be set aside. If it is to be validated, it must have independent marketability. For reasons elaborated, *infra*, we believe that it does not and therefore to this extent the Judge's decision must be reversed.

The Judge also found that the contestee had not established marketability as of July 23, 1955, for any of the remaining Charleston placer claims.

Contestee admits that there was no evidence of actual sales as regards the Charleston, and Charleston Nos. 1, 2, 3, 5, 18, 19, 20, and 22.

The contestee argues that leach rock was quarried on Claim No. 8, but no testimony was adduced on this contention. Contrary to contestee's interpretation both contestant's Exhibit 6 and contestee's Exhibit X-4 support the government witness Fisher's statement that the quarrying occurred at the southwest corner of Claim No. 10 and outside of the northeast corner of Claim No. 8. It is, of course, obvious that the "face" of the deposit continues into Claim No. 8, but there is, in the record, no evidence of any mining of leach rock from Claim No. 8. As regards the testimony of Mr. Wheeler, it is to be noted that it was stipulated by counsel for both parties that leach rock has a useful life of approximately 15 years. The demand for leach rock is limited to that amount needed to supply nearby sewage and water filtration plants, a market which is both limited and of infrequent recurrence. *Cf. United States* v. *Clark County Gravel, Rock and Concrete Company*, A-31025 (March 27, 1970) as regards the supply of volcanic or leach rock in the Las Vegas area. We have noted,

supra, that the marketability requirement as it relates to minerals withdrawn from location is a continuing one, and while it may be difficult to draw a precise line delineating at what point the loss of a market has negated a prior discovery, it is obvious from the facts of the instant case that such a loss occurred here. Since relocation of the claim is impossible, the proposed expansion of the filtration system in the area which coincided with the contest proceedings would be insufficient to revive a claim predicated on the presence of leach rock thereon. Therefore, these removals may not properly be considered in the determination of the marketability of the deposits in Claims Nos. 4, 6, 16, 17 and 21.

The removals by Vernon Frehner occurred in 1956. Accordingly, they may not properly be considered as to the issue of marketability at the critical date of July 23, 1955.

Stocks testified that his purchases of materials terminated in 1948. Contestee argues that because of his advanced age, Stocks was mistaken as to the dates involved. It seems to us somewhat anomalous to argue that Stocks could err up to seven years as regards the time element and then go on to contend that his testimony is sufficiently accurate in reference to the location of the mining activities so as to validate Claims Nos. 8, 11, 12, 14 and 15. Be that as it may, Stocks repeatedly testified that he had no access to the claims after 1948 and his testimony as to the withdrawals can only be given weight in relation to the dates he has insisted on.

Jacka's testimony referred to Claims Nos. 13, 13A and 14. Claim No. 13A, of course, has already been deemed void ab initio since it was not located until after the passage of the Act of July 23, 1955. Jacka, however, at one point declared that he bought no material until 1956 and another time declared that Brawner was the low bidder for supplying chips to the city of North Las Vegas from 1954 to 1958. This apparent contradiction in testimony can only be reconciled by assuming that though Brawner was the low bidder, no actual purchases were made until 1956. This is in accord with Jacka's statement concerning a flood in either 1954 or 1955, the aftermath of which prevented resurfacing work from going forward. Accordingly, no actual sales have been proved from the claims at the critical date. The other testimony as regards extractions was too general to be efficacious in determining the locus of actual sales occurring prior to the critical date.

Actual sales, however, are only one indicium of marketability. Other relevant criteria are bona fides of development and distance to the market. As of 1955 the distance to the market from the main pits, approximately 15 miles, appears excessive. Certainly the distance cannot be said to weigh positively on the side of marketability. Furthermore, bona fides in development occurred only in Claim No. 10.[3] Bona fides,

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[3] It is to be noted that much of the evidence adduced at the hearing related to present developmental intentions. However relevant such plans may be to the issue of marketability at the time of the contest proceedings, they cannot be said to

like marketability, must be related to specific claims, and contestee cannot successfully apply the bona fides shown as regards No. 10 to validate the other claims.[4]

Considering the market demand and the supply available for that market as of July 23, 1955, we find that the contestee has not met the burden of proving marketability as to the claims other than Claim No. 10.

We have also considered the evidence in light of the recent decision of the Ninth Circuit Court of Appeals in *United States* v. *Verrue*, 457 F.2d 1202 (1972). We note that its rationale is inapplicable to the case at bar. In *Verrue* the Court validated the contested claim because there was no controversion of appellee's evidence that the "material on Sandy No. 2 was marketable at a profit" during the relevant period. *Id.* at 1204. Thus, the opinion in that case was directed to a contest of a single claim.

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bear on the issue of marketability as of July 23, 1955. Since we have decided that there was no showing of marketability as of the date of withdrawal of sand and gravel from mineral location, it is unnecessary to examine the question of whether, and to what extent, marketability was shown as of the date of the initiation of the proceedings.

[4] Contestee protests that this decision would leave him without a water supply. While this may well be the case, it is nevertheless impossible to validate a claim simply because the contestee needs it for the more economic workings of a valid claim. Claim No. 22, on which the well is located, must stand or fall on the merits of *its* discovery. Having determined that there was no valid discovery thereon, *supra*, the mere fact that there is now a producing water well on the claim will not nullify the absence of a valid discovery.

This case, on the other hand, involves twenty-five different claims. The only clear statement as to marketability at the critical date is found in the deposition of Starr Hill, Jr. He declared that he considered all the Charleston claims to be valid.

This simple statement, however, cannot be used to validate all twenty-five claims. All that it can fairly be said to indicate was that there was an existing market, at the critical date, for sand and gravel from some of the claims embracing the deposit. To the extent that this declaration has reference to Claim No. 10 we agree. But it cannot be said that Hill had advertence to each of the twenty-five claims when he made his statement; the very next question asked was whether he agreed "* * * that the deposit encompassed by the claims was a valid mineral deposit under the mining laws?" To which Hill answered, "Yes."

It seems clear that Hill was utilizing the theory, advanced by the contestee, that the establishing of the validity of one claim on a single deposit has the effect of validating all claims on that deposit. We have rejected this position for the reasons stated, *supra*.

Another crucial difference between the case at bar and that in *Verrue* is that the latter case does not encompass the issue of loss of market after a valid location, but is merely limited to the question of the marketability of the claim at the critical date. In the instant case sales, developmental work, etc., on all of the claims, with the exception of Claim No. 10, occurred infrequently and intermittently. Thus,

even if a finding of marketability as of July 23, 1955, were mandated by the *Verrue* decision, subsequent events provide ample proof that the marketability had been lost and could not be regained, for the reasons discussed, *supra*. Therefore, the *Verrue* case does not, by any realistic reading, require the validation of all of these claims.

Appellant has requested oral argument. The issues in this case, however, have been extensively briefed by both parties before the Judge and again before this Board. Oral argument would therefore serve no useful purpose and it is hereby denied.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision of the Administrative Law Judge is reversed as to its holding that the Charleston No. 9 placer mining claim is valid, and is affirmed as to its holding that the Charleston No. 10 placer mining claim is valid, and the Charleston, and the Charleston Nos. 1-8, 11-22, 12A and 13A placer mining claims are invalid.

/s/ Douglas E. Henriques
DOUGLAS E. HENRIQUES, Member

We concur:

/s/ Joseph W. Goss
JOSEPH W. GOSS, Member

/s/ Martin Ritvo
MARTIN RITVO, Member

APPENDIX E

[SEAL]

UNITED STATES
DEPARTMENT OF THE INTERIOR

Office of Hearings and Appeals
Interior Board of Land Appeals

4015 Wilson Boulevard
Arlington, Virginia 22203

ROBERT L. BEERY, *et al.*

IBLA 76-354 Decided June 28, 1976

Appeal from decision of California State Office, Bureau of Land Management, rejecting patent application CA 3206 and declaring two mining claims null and void.

Affirmed.

1. Mining Claims: Generally—Mining Claims: Locatability of Mineral: Generally—Mining Claims: Specific Minerals Involved: Water
   Water is not a mineral which is locatable under the general mining law.
2. Mining Claims: Generally
   The bottling and distribution for sale of spring water for human consumption does not constitute the making of a valuable mineral deposit under the general mining law.
3. Mining Claims: Withdrawn Lands—Withdrawals and Reservations: Effect of
   Mining claims located on land withdrawn from

all forms of entry are null and void from the beginning.

4. Withdrawals and Reservations: Springs and Waterholes
Even though springs and waterholes withdrawn from mineral entry by Executive Order 107 may not be in use, they nevertheless remain withdrawn so long as they provide sufficient water for public watering purposes.

APPEARANCES: Robert L. Beery, Esq., San Francisco, California, for appellants.

OPINION BY
ADMINISTRATIVE JUDGE STUEBING

Robert L. Beery and others appeal from the November 10, 1975, decision of the California State Office, Bureau of Land Management (BLM), rejecting their patent application (CA 3206) for two placer mining claims and declaring both claims to be null and void. The mining claims known as the Chemise Springs and South Chemise Springs placer mining claims, are situated in sections 30 and 31, T. 5 S., R. 2 E., Humboldt Meridian, California. The California State Office rejected both claims for two reasons. First, the claims were located on land which was withdrawn from mineral entry. Second, the purported discovery is of "natural mineral spring water," a substance held to be not locatable by an earlier decision of this Department.

Appellants assert that the land was not actually withdrawn from mineral entry. Moreover, they ar-

gue, since mineral spring water is widely considered to me a mineral, it should be locatable under the general mining law, 30 U.S.C. § 21 *et seq.* (1970). Its value, they assert, lies in the fact that the spring water may be bottled and sold at a profit for human consumption.

[1] This Department long ago held that mineral spring water is not locatable under the general mining law. *Pagosa Springs*, 1 L.D. 562 (1882). In that case, Secretary Teller stated:

> Many springs and many waters are impregnated with minerals held in solution; but it does not follow that the lands bearing such waters are mineral lands, and can be patented as such. Lands of a saline character are an exception, and are expressly provided for in the laws relating to the disposition of the public lands. Lands containing mineral springs not of a saline character are subject to sale under the general laws, and not under the acts relating to the sale of mineral lands. * * * [Citation omitted.]

In a second case arising only a year later, Secretary Teller stated:

> Where it is evident that an application for a placer claim is in fact an attempt to secure a patent for a water right the application will be rejected.

William A. Chessman, 2 L.D. 774 (1883). While this case deals with water generally, instead of mineral spring water, specifically, the principle is still the same: water is not a mineral which is locatable un-

der the general mining law, and an application for patent to a placer mining claim which is perceived to be an attempt to acquire a water right must be rejected.

Another case involving mineral water is *United States* v. *Springer*, 8 IBLA 123 (1972), *aff'd*, 491 F.2d 239 (9th Cir. 1974), *cert. denied*, 419 U.S. 834 (1975). In that case there were mineral springs on 6 of the 10 mining claims involved. Some of the water was evaporated, leaving mineral salts which were then packaged and "hawked" through Dr. Springer's religious radio programs. Some of the water was also used for bathing purposes. Dr. Springer believed that the mineral salts and mineral water had medical benefits. While the locatability of the mineral water was not directly in issue in that case, it is clear that the Court of Appeals for the Ninth Circuit did not consider these activities to be mining within the meaning of the law. The opinion by the Court of Appeals noted that some of the mineral spring water was bottled and distributed gratis, and other water from the claimed springs was used for therapeutic baths. Although the water was not sold for a price, contributions were solicited.

In *United States* v. *Union Oil Co. of Calif.*, 369 F. Supp. 1289 (D. N.D. Calif. 1976), the Court held that a reservation of "coal and other minerals" to the United States on lands patented under the Stock-raising Homestead Act did not include a reservation of geothermal steam and other geothermal resources, since they are not "minerals" within the meaning of

the Act. The Court noted that the strong weight of authority is that water was not considered to be a mineral when the legislation was enacted in 1916. At 1297.[1]

The most recent reference by this Board to the locatability of mineral water appears in *United States* v. *Bienick*, 14 IBLA 290, 297 (1974), where, in a special concurrence, it was noted that among materials held to be not locatable was mineral spring water, citing *Pagosa Springs*, *supra*.[2]

If we are to pay more than lip service to the doctrine of stare decisis we must adhere to those cases, unless there is some compelling reason to the contrary. Appellants argue that because mineral spring water is widely considered to be a mineral, it should be locatable pursuant to section 1 of the Act of May 10, 1872, *as amended*, 30 U.S.C. § 22 (1970). That act provides that *all* valuable mineral deposits in public domain lands are open to exploration and purchase. Appellants' argument is not persuasive for

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[1] Appeal pending. However, even were the ruling in *Union Oil* reversed, it would not alter our conclusion in this case, as all minerals which may be included in a patent reservation are not necessarily locatable under the mining law. *See* discussion of non-locatable minerals, *infra*.

[2] The decisions in *United States* v. *Gray*, A-28710 (May 18, 1962); A-28710 (Supp., May 7, 1964); A-28710 (Supp. II, April 6, 1965), do not concern the locatability of mineral spring water. What was at stake were deposits of mineral salts which were used to make mineral water. The issue was not whether the "manufactured" mineral water was locatable, but whether the mineral salts used in the manufacture were locatable. The claims were held invalid in that case.

several reasons. First, whether water is considered a mineral generally depends on the context. Second, not all minerals are locatable under the general mining law. Third, even salt springs were never disposable under the Act of May 10, 1872. *See* Opinion, 49 L.D. 502 (1923). Fourth, Congress could not have intended for water to be locatable under the mining law.

In support of their argument that water is mineral, appellants have cited a number of cases. The lead case is *United States* v. *Shurbet*, 347 F.2d 103 (5th Cir. 1965). In that case, the Court of Appeals for the Fifth Circuit did say in dictum that water in the North Texas area is a mineral. *Ibid.* at 107. However, the issue in that case is whether water is a "natural deposit" within the meaning of section 611 of the 1954 Internal Revenue Code, 26 U.S.C. § 611 (1970). That section deals with cost depletion for mining. The court held that water in the "high plains" area of North Texas is such a deposit. That finding in no way turned on water being classified as a mineral. The only California case cited is *Cornwell* v. *Buck & Stoddard*, 28 Cal. App. 2d 333, 82 P.2d 516, 518 (2d Dist. Ct. App. Cal. 1938), where the court stated:

> Minerals are usually solids. The only ones which are liquids at ordinary temperatures being water and mercury.

As with the previous case, the statement was pure dictum. The issue was whether oil and gas drilling equipment, for tax purposes, should be considered

mining equipment. Notwithstanding the dicta in some cases, there are cases construing deeds finding water to be a mineral; there are also many to the opposite effect. *See, e.g., Stephens Hays Estate Inc.* v. *Togliatti*, 85 Utah 137, 38 P.2d 1066 (1934), where a solution of copper and water was found not to be a mineral in a deed conveying all minerals in or on the land; *Vogel* v. *Cobb*, 193 Okla. 64, 141 P.2d 276 (1943), where "other minerals" in a deed did not include water even though in a technical sense it may be thought of as a mineral; *Sun Oil Co.* v. *Whitaker*, 412 S.W.2d 680, 684 (Tex. Civ. App. 1967), *aff'd* 424 S.W.2d 216 (Tex. 1968).

Even if water were held to be a mineral it does not necessarily follow that it is locatable under the general mining law. In *Northern Pacific Ry. Co.* v. *Soderberg*, 188 U.S. 526, 530 (1903), the Supreme Court stated:

> The word "mineral" is used in so many senses, dependent upon the context, that the ordinary definitions of the dictionary throw but little light upon its signification in a given case. Thus the scientific division of all matter into the animal, vegetable or mineral kingdom would be absurd as applied to a grant of lands, since all lands belong to the mineral kingdom, and therefore could not be excepted from the grant without being destructive of it.

As was pointed out in the spcial concurrence in *United States* v. *Bienick*, *supra*, many minerals are not considered locatable, even though a profit might be made from their sale. Among these minerals are

dirt, common clay, "fill" material, brick clay, peat, certain limestone and "blow sand." In discussing the reasons why these materials are not locatable, we apply Justice Holmes' statement that, "A page of history is worth a volume of logic." *New York Trust Co.* v. *Eisner*, 256 U.S. 345, 349 (1921).

What is loosely referred to as the "general mining law" includes several different laws enacted within a decade of the Civil War. At the same time, this was also the period when the American West was being won by those ubiquitous heroes of contemporary legend and entertainment—cowboys, soldiers, and particularly, miners and homesteaders. At that time land was classified by the General Land Office as being either mineral land or agricultural land. Mineral land could be entered only under the mining laws; agricultural land could be entered only under the agricultural land laws, such as the homestead and desert land entry acts. Also during this period the Congress was awarding grants of non-mineral land to the states and to the railroads. If all those substances which are quite literally "minerals," such as common dirt, were locatable under the mining law, there could have been no entry under the homestead or other agricultural entry laws, nor any land grants to states and railroads, as all land would then have been "mineral land." This was the Department's point in *Holman* v. *State of Utah*, 41 L.D. 314, 315 (1912):

> It is not the understanding of the Department that Congress has intended that lands shall be

> withdrawn or reserved from general disposition, or that title thereto may be acquired under the mining laws, merely because of the occurrence of clay or limestone in such land, even though some use may be made commercially of such materials. There are vast deposits of each of these materials underlying great portions of the arable land of this country. It might pay to use any particular portion of these deposits on account of a temporary local demand for lime or for brick. If, on account of such use or possibilities of use, lands containing them are to be classified as mineral, a very large portion of the public domain would, on this account, be excluded from homestead and other agricultural entry. It is safe to say that every kind of material found in land in its natural state may under some circumstances be put to non-agricultural uses. Local demand for building of levees or railroad embankments, filling up low places and the like, may make any particular land more valuable for the time on account of the material it contains than on account of its agricultural possibilities, but it is clear that such considerations can not be given weight in determining what lands are reserved for special disposition because mineral in character. In one sense, all land except portions of the top soil is mineral. The term, however, in the public-land laws is properly confined to land containing materials such as metals, metalliferous ores, phosphates, nitrates, oils, etc., of unusual or exceptional value as compared with the great mass of the earth's substance.

Moreover, even though the need to have land available for homesteads may have diminished, there is a

more compelling reason for continuing to hold that certain minerals are not locatable. To hold otherwise is to invite widespread abuse of the mining law. Sand and gravel provide an excellent example on this point. Prior to 1929 sand and gravel were not considered locatable under the general mining law. Several ostensible reasons were given for that holding in *Zimmerman* v. *Brunson*, 39 L.D. 310 (1910). Though not stated until 1933, the Department's real objection was the ease with which one could obtain a patent to public land for uses other than mining merely by asserting that the land was valuable for sand, gravel, or other minerals of widespread occurrence. *Solicitor's Opinion*, 54 I.D. 294, 296 (1933). Nevertheless, the Department ignored these fears which turned out be all too prescient. Between 1929, when sand and gravel was first held to be locatable, and 1955, the abuse of the mining law by sand and gravel claimants seeking title to public land for purposes other than mining became so offensive that the Congress, with the support of the mining industry, finally removed sand, gravel, and certain other common minerals of widespread occurrence from locatability under the mining law. Act of July 23, 1955, 30 U.S.C. §§ 611-615 (1970). Because of the widespread occurrence of water, the Department would be inviting a repeat of the abuses attending the locatability of sand and gravel, if it were to hold water locatable.

Even if these difficulties could be surmounted, it is nevertheless clear that Congress could not have in-

tended that water be locatable. Through the enactment of three different provisions coetaneous with the enactment of the mining law, it is apparent that Congress intended that water should be severed from the public domain and acquired in accordance with the laws of the various western states. The first of the three provisions is section 9 of the Act of July 26, 1866, 30 U.S.C. § 51 (1970), part of the general mining law. Essentially, this provision recognized rights which had accrued under the appropriation system and provided for rights of way for ditches and canals. The recognition of rights under the appropriation system was approval of the severing of water from the public domain. The second provision dealing with water is section 17 of the Act of July 9, 1870, *as amended*, 30 U.S.C. § 52 (1970), also part of the general mining law. That act provides that all patents to public lands would henceforth be subject to the provisions of section 9 of the Act of July 26, 1866, 30 U.S.C. § 51 (1970). The third provision is section 1 of the Act of March 3, 1877, *as amended*, 43 U.S.C. § 321 (1970), part of the desert land entry laws. The Supreme Court discussed at length the effect of the three provisions in *California Oregon Power Co.* v. *Beaver Portland Cement Co.*, 295 U.S. 142, 154-56 (1935). It concluded with respect to the last provision:

> As the owner of the public domain, the government possessed the power to dispose of land and water thereon together, or to dispose of them separately. *Howell* v. *Johnson*, 89 Fed. 556, 558.

> The fair construction of the provision now under review is that Congress intended to establish the rule that for the future the land should be patented separately; and that *all non-navigable waters thereon should be reserved for the use of the public under the laws of the states and territories named.* The words that the water of all sources of water supply upon the public lands and not navigable "shall remain and be held free for the appropriation and use of the public" are not susceptible of any other construction. The only exception made is that in favor of *existing* rights; and the only rule spoken of is that of *appropriation.* It is hard to see how a more definite intention to sever the land and water could be evinced. [Emphasis added.]

295 U.S. at 162.

There is only one conclusion that can be drawn from the preceding statement. Because the usufructuary right to water was to be disposed of in accordance with *state* law, it could not at the same time be disposed of under the general mining law. Moreover, because two of the three statutory provisions severing the water from the land were enacted as *part* of the general mining law, it seems fairly clear that Congress had no intention of disposing of water under other provisions of the mining law.

Therefore, we adhere to previous decisions of this Department holding that water or mineral water is not a mineral which is locatable under the general mining law. *Pagosa Springs, supra; William A. Chessman, supra; United States* v. *Bienick, supra.*

[3] As previously noted, appellants also challenge the finding by the BLM that the land in question was and is withdrawn from entry under the mining law. The California State Office held in its decision:

> By Executive Order No. 5237 of December 10, 1929 all of the unreserved public lands in T. 5 S., R. 2 E., H.M. were temporarily withdrawn for classification. Subsequently, the King Range National Conservation Area was established by Secretarial Order of September 21, 1974 under the Act of October 1, 1970 (84 Stat. 1067; 16 U.S.C. 460y) and Executive Order No. 5237 was revoked in accordance with Sec. 8 of the Act.
>
> Therefore, at the time of the purported locations and amendments thereto of the Chemise Springs placer mining claim on September 27, 1970 and June 25, 1972; and the South Chemise Springs placer mining claim on September 26, 1970 and June 25, 1972 the land was effectively withdrawn from location by Public Water Reserve No. 107 and Executive Order No. 5237 and the claims are hereby declared null and void ab initio.

It is important to note at this point that both claims were located in 1970; amended location notices for each claim were filed in 1972 and 1975. It is clear that E.O. 5237 was revoked by section 8 of the Act of October 21, 1970, 16 U.S.C. § 460y-7 (Supp. IV 1974), as of the date of Secretarial Order establishing the King Range National Resource Area, September 21, 1974. Any claim located prior to that time was null and void from the beginning, as mining claims

may not be located on land closed to mineral entry. *John Boyd Parsons*, 22 IBLA 328 (1975); *Russ Journigan*, 16 IBLA 79 (1974); *Albert Gardini*, A-30958 (October 16, 1968); *Leo J. Kottas*, 73 I.D. 123 (1966); *aff'd sub nom. Lutzenheiser* v. *Udall*, 432 F. 2d 328 (9th Cir. 1970). Therefore, only the 1975 location notices remain in issue, as the previous notices were of no effect.

[4] Appellants contend that Executive Order 107 of April 17, 1926, 43 CFR 2311.0-3, 43 U.S.C. § 300 (1970), does not bar mining in this area. They contend that the order never applied to these lands because it was never noted on land office records. That argument is not persuasive as the withdrawal has been a matter of public record since its promulgation. *See, e.g., Instructions*, 51 L.D. 457 (1926); 43 CFR 292.1, 2, 3 (1938); 43 CFR 2321.1-1 (1969); 43 CFR 2311.0-3 (1976).[3] *See also* the discussion of this point in *John V. Hyrup*, 15 IBLA 412, 415-16 (1974).[4]

Appellants argue in the alternative that the land is unlikely to be used for watering because the springs are either too small or too inaccessible to be used for watering purposes.[5] Appellants speak of a "modest"

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[3] Actually, the withdrawal does not appear in land office records under the "Index to Miscellaneous Documents, Documents Applying to Lands Not Specifically Described on Which Conditions Restricting Disposal or Use May Exist."

[4] Reversed on other grounds *sub nom. Hyrup* v. *Kleppe*, 406 F. Supp. 214 (1976), appeal pending.

[5] Although appellants assert that the waters from the subject springs are healthful, it is not clear whether the waters have any restorative powers. In the Statement of Reasons at

quantity of water and state that the flow is "totally insufficient" for the stated purpose of the withdrawal —stock watering. According to appellants' patent application, they plan to bottle 840 gallons of water per day. That amount is certainly sufficient for public watering purposes. The principal criterion for withdrawal is *whether* there is sufficient water for possible use. *See Frank Rauzi*, A-28602 (August 15, 1962).

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

/s/ Edward W. Stuebing
EDWARD W. STUEBING
Administrative Judge

We concur:

/s/ Joseph W. Goss
JOSEPH W. GOSS
Administrative Judge

/s/ Martin Ritvo
MARTIN RITVO
Administrative Judge

6, appellants describe the springs as "substantially mineralized." However, in that context it is noteworthy that "every smallest legal subdivision of the public land which * * * contains a hot spring, or a spring the waters of which possess curative properties; and all the land within one-quarter mile of such spring located on unsurveyed land be * * * withdrawn from settlement, location, sale, or entry, and reserved for lease * * *." 43 CFR 2311.0-3(b).

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